Supreme Court, U.S.
FILED
JUL 22 1992
OFFICE OF THE CLERK

No. 91-1594

In The

Supreme Court of the United States

October Term, 1992

FRED H. EDENFIELD, *et al.*,

Petitioners,

v.

SCOTT FANE,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

JOINT APPENDIX

ROBERT A. BUTTERWORTH
Attorney General

JOHN J. RIMES, III
Assistant Attorney General
Department of Legal Affairs
Suite LL04, The Capitol
Tallahassee, Florida 32399-1050
(904) 488-5234

PARKER D. THOMSON*
CAROL A. LICKO
Special Assistant Attorneys General
Suite 1700,
1 S.E. Third Street
Miami, Florida 33130
(305) 350-7200

Counsel for Petitioners

DAVID C. VLADECK*
ALAN B. MORRISON
Public Citizen Litigation Group
2000 P Street, N.W.
Washington, D.C. 20036
(202) 833-3000

Counsel for Respondent

*Counsel of Record

Petition for Certiorari Filed March 30, 1992
Certiorari Granted May 26, 1992

Table of Contents

		Page
1.	Complaint for Injunctive and Declaratory Relief	1
2.	Answer	7
3.	Affidavit of Scott Fane	9
4.	Affidavit of Louis W. Dooner	16
5.	Supplemental Affidavit of Scott Fane	25
6.	Report of Special Committee on Solicitation by American Institute of Certified Public Accountants ("AICPA")(1981)	29
7.	Order entered by the United States District Court on September 14, 1990, granting Plaintiff's Motion for Summary Judgment	78
8.	Opinion entered by the 11th Circuit Court of Appeals on October 30, 1991, affirming Order of the United States District Court, *Fane v. Edenfield*, 945 F.2d 1514 (11th Cir. 1991).	90
9.	Order entered by the 11th Circuit Court of Appeals on December 31, 1991, denying Suggestion of Rehearing En Banc	110

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

SCOTT FANE,

Plaintiff,

v. Civil Case No. 88-10140

BOARD OF ACCOUNTANCY, DEPARTMENT
OF PROFESSIONAL REGULATION;
FRED H. EDENFIELD, JR.;
RICHARD J. ABOUD;
WHIPPLE VAN NESS JONES, JR.;
MARGARET F. STROUPE;
DEAN F. DENISON;
WILLIAM R. MARTIN;
JOSEPH R. MILLSAPS;
ANTONIO L. ARCIZ; and
JEROME A. SCHINE,

In their official capacity
as Members of the Board of
Accountancy

Defendants.

_____)

COMPLAINT FOR INJUNCTIVE AND
DECLARATORY RELIEF

1. This action under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution seeks injunctive and declaratory relief prohibiting the defendants from continuing to enforce Fla. Stat. § 473.324(1)(l) (1987) and Fla. Admin. Code Rule 21A-24.002, which forbid Florida Certified Public Accountants from engaging in any direct, in-person, uninvited solicitation in an effort to obtain new clients.

2. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343(3).

3. Plaintiff Scott Fane is a Certified Public Accountant ("CPA") licensed by defendant Board of Accountancy to practice in the State of Florida.

4. Defendant Board of Accountancy ("Board") is an entity within the Florida State Department of Professional Regulation, and is an instrumentality of the State of Florida. The Board's principal place of business is located in Gainesville, Florida. Defendants Fred H. Edenfield, Jr., Richard J. Aboud, Whipple Van Ness Jones, Jr., Margaret F. Stroupe, Dean F. Denison, William R. Martin, Joseph R. Millsaps, Antonio L. Argiz and Jerome A. Schine are members of the Board. The Board is charged with the responsibility of licensing and regulating the practice of CPAs within the State of Florida. It has promulgated and continues to enforce Fla. Admin. Code Rule 21A-24.002, which implements Fla. Stat. § 473.323(1)(l), which forbids CPAs from engaging in direct, in-person, uninvited solicitation. The Board and its members are sued only in their official capacities.

BACKGROUND

5. The State of Florida, through statutes and administrative rules, comprehensively regulates the practice of accountancy by CPAs within the State. See generally Fla. Stat. §§ 473.301 et seq.; Fla. Admin. Code Rules 21.A-24.001, et seq.

6. Fla. Stat. § 473.323(1)(l) provides that CPAs may be subject to disciplinary action for "[e]ngaging in direct, in person, uninvited solicitation of a specific potential

client, except to the extent that such solicitation constitutes the exercise of constitutionally protected speech as determined by the rules of the board."

7. Pursuant to its rulemaking authority, see Fla. Stat. § 473.304, the Board has issued a regulation defining what conduct constitutes prohibited "direct, in-person, uninvited solicitation." Under the Board's regulation, "any communication which directly or implicitly requests an immediate oral response from the recipient" constitutes an unlawful solicitation. Fla. Admin. Code Rule 21A-24.002(3). The regulation goes on to specifically state that "[u]ninvited in-person visits or conversations or telephone calls to a specific potential client are prohibited." Id.

8. The statutory provisions and regulations governing practice by CPAs, including the anti-solicitation restraints challenged here, do not apply to accountants.

9. Plaintiff Scott Fane moved in July 1985 from Haddonfield, New Jersey, where he was self-employed, to Homestead, Florida, where he wishes to establish an accountancy practice. In order to do so, he is willing to offer his services at rates below the prevailing market rate for CPAs in the community.

10. Mr. Fane wants to develop a clientele of small to mid-size businesses in the Homestead area, but he is seriously hampered in doing so by the restrictions on direct, in-person, uninvited solicitation set forth in Fla. Stat. § 473.323(1)(l) and Fla. Admin. Code Rule 21A-24.02[sic].

11. But for Florida's restrictions on in-person solicitation by CPAs, Mr. Fane would seek to obtain new clients by

meeting with individuals who own or manage small to mid-size businesses.

12. At such a meeting, Mr. Fane would have the opportunity to describe in full the services that he offers and the price that he would charge. Mr. Fane would explain why he can offer superior service to clients as compared with other CPAs or accountants. Among other things, Mr. Fane would point out that (a) he has ten years of experience as a CPA, with training at Touche, Ross & Co. and Haskins & Sells, both of which are well regarded "big eight" accounting firms; (b) he offers personal service, unlike many competitor CPA firms that use interns, trainees or bookkeepers to handle their clients' affairs; (c) he is willing to tailor his services directly to his client's needs; and (d) he is exceptionally well-qualified, having an accounting degree, a CPA license, a Masters Degree in Taxation and an appointment as an adjunct Professor of Accounting at Miami Dade Community College.

13. Mr. Fane brings this action because Florida's prohibition on in-person, direct, uninvited solicitation, including initial telephone calls, denies him the opportunity to communicate this and similar information to potential clients personally and interferes with his ability to compete with other CPAs and with accountants who are not affected by these restrictions.

CLAIMS FOR RELIEF

14. Florida's restrictions on direct, in-person, uninvited solicitation by CPAs violates the First Amendment to the United States Constitution, made applicable to the State of Florida through the Fourteenth Amendment. Florida's

categorical ban on direct, in-person, uninvited solicitation by CPAs, impermissibly restricts the dissemination of truthful, accurate information relating to a lawful activity, i.e, the provision of accountancy services by a licensed CPA, and the availability and terms of such services. The ban serves no legitimate state interest, and in any event, as a flat prohibition, it is not narrowly drawn.

15. Florida's restrictions on direct, in-person, uninvited solicitation, which are applicable only to CPAs but not to accountants, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, since they single out CPAs alone for discriminatory treatment, and are not even rationally related to any legitimate state interest.

16. Unless the defendant State Board of Accountancy is enjoined from enforcing Florida's prohibition on in-person, direct, uninvited solicitation, plaintiff will continue to suffer irreparable harm.

WHEREFORE, plaintiff prays for an Order

A. Preliminarily and permanently enjoining defendants from enforcing the proscriptions in Fla. Stat. § 473.323(1)(l) and Fla. Admin. Code Rule 21A-24.002, that prohibit Certified Public Accountants from engaging in direct, in-person, uninvited solicitation;

B. Declaring that the proscriptions in Fla. Stat. § 473.323(1)(l) and Fla. Admin. Code Rule 21A-24.002, that prohibit Certified Public Accountants from engaging in direct, in-person, uninvited solicitation violate the First and Fourteenth Amendments to the United States Constitution;

C. Awarding plaintiff his costs and attorneys' fees, pursuant to 42 U.S.C. § 1988; and

D. Granting plaintiff such other and further relief as is just and proper.

ALBERT J. HADEED
Southern Legal Counsel, Inc.
115-A N.E. 7th Avenue
Gainesville, FL 32601
(904) 336-2144
Attorneys for Plaintiff

Date: 8/17/88

DAVID C. VLADECK
ALAN B. MORRISON
Public Citizen Litigation Group
Suite 700, 2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Of Counsel

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SCOTT FANE,

Plaintiff,

vs. Civil Case No. TCA 88-40264-MP

FRED H. EDENFIELD, JR.;
RICHARD J. ABOUD;
WHIPPLE VAN NESS JONES, JR.;
MARGARET F. STROUPE;
DEAN F. DENISON;
WILLIAM R. MARTIN;
JOSEPH R. MILLSAPS;
ANTONIO L. ARGIZ; and
JEROME A. SCHINE,
In their official capacity
as members of the Board of
Accountancy,

Defendants.

/

ANSWER

Defendants, Fred H. Edenfield, Jr., et al., in their official capacity as members of the Board of Accountancy hereby file this their answer to the Complaint for Injunctive and Declaratory Relief filed in this cause on August 17, 1988 and, pursuant to the stipulation of counsel, the Order of this court dated September 23, 1988 and say:

1. Defendants admit paragraphs 3, 4, 5, 6, 7, 8 of the Complaint.

2. Defendants deny paragraphs 13, 14, 15 and 16 of the Complaint.

3. Defendants are without knowledge as to paragraphs 1, 2, 9, 10, 11 and 12 of the Complaint.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JOHN J. RIMES, III
Assistant Attorney General
Department of Legal Affairs
Suite 1602, The Capitol
Tallahassee, Florida 32399-1050
(904) 488-1891

CHARLES P. TUNNICLIFF
Senior Attorney
Department of Professional Regulation
130 North Monroe Street
Tallahassee, Florida 32399-0750

CERTIFICATE OF SERVICE

I HEREBY certify that a true and correct copy of the foregoing has been forwarded by U.S. Mail to David C. Vladeck and Alan B. Morrison, Public Citizen Litigation Group, Suite 700, Washington, D.C., 20036 and Albert J. Hadeed, Southern Legal Counsel, Inc., 115-A Northeast 7th Avenue, Gainesville, Florida 32601 this 6th day of October, 1988.

JOHN J. RIMES, III
Assistant Attorney General

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SCOTT FANE,
Plaintiff,
v. Civil Case No. TCA 88-40264-MP
FRED H. EDENFIELD, JR., et al.,
Defendants.

AFFIDAVIT OF SCOTT FANE

1. I am the plaintiff in this action, and I submit this affidavit in support of plaintiff's motion for summary judgment.

2. I am a certified public accountant (CPA), licensed as a CPA in the State of Florida and the State of New Jersey. I hold a Bachelor of Science degree in Accounting from Rutgers, the State University of New Jersey, which was awarded in 1977. I also hold a Masters Degree in Taxation, from the School of Business, Georgia State University, which was awarded in 1979. I was first licensed as a certified public accountant by the State of New Jersey in February 1981. At present, I am also an Adjunct Professor of Accounting at Dade County Community College.

3. I have practiced as an accountant ever since I graduated from College. Thus, in 1977, I was employed as an accountant by American Part Systems, a wholly-owned subsidiary of Gulf & Western Corporation, in Atlanta, Georgia. After obtaining my masters degree in 1979, I was

employed as an accountant, and then as a CPA, for the accounting firm of Touche, Ross & Co., first in Atlanta, and then in Newark, New Jersey. In the Spring of 1981, after having received my CPA license, I left Touche, Ross & Co. and held a number of interim positions. Then, in late 1981, I took a position in the tax department of Deloitte, Haskins & Sells, in Cherry Hill, New Jersey. Thereafter, in early 1983, I joined the CPA firm of Rosenberg & Mincer in New Jersey, where I stayed until late 1984, when I founded my own practice in Haddonfield, New Jersey.

4. In July 1985, I decided to move from New Jersey to Florida, and establish an accountancy practice. I settled in Homestead, Florida, and was licensed as a CPA in Florida in June 1985.

5. With my background and expertise in the field of corporate and commercial taxation, my principle goal in establishing my own practice was to obtain corporate and commercial clients that have sufficiently complex accounting and taxation needs to justify the retention of a highly skilled accountant, preferably on a long-term basis. I have no interest in engaging in direct solicitation to secure individuals as clients, and I certainly have no intention of soliciting individuals either in person or over the telephone in the event I prevail in this litigation. Rather, my efforts to secure clients through direct solicitation are focused exclusively on small and mid-size corporate and other commercial entities.

6. Of course, most businesses already have accountants and CPAs either on retainer, or have developed a relationship with an accountant or CPA so that when the business needs assistance, at tax time, for instance, the

understanding is that the business will ask the accountant or CPA for assistance. Thus, in order for me to obtain clients, I need to persuade businesses that I can offer accounting services that are superior to their present arrangement, either in terms of quality or price or both.

7. The most effective way to persuade any commercial entity to shift its accounting services is to discuss, face-to-face, with a company official both the company's specific needs, and the particular skills and services the CPA can offer. Professional accounting services must be tailored specifically to the needs of each client. It is only through face-to-face discussions that the CPA and the potential client can see whether the services the CPA offers are suited to the needs of the business. For this reason, advertising in newspapers or magazines, or even letters to potential clients, would not assist me in securing clients. Moreover, it is very expensive. In my experience, direct, in-person contact is indispensible in obtaining business.

8. The accounting profession has long recognized this fact. In both Georgia and New Jersey where I was previously employed, and indeed, in most jurisdictions I am familiar with, accountants and CPAs routinely engage in direct, in-person, uninvited solicitation of potential clients. It was commonplace, for example, for a partner at Touche, Ross & Co., or Deloitte, Haskins & Sells, where I was employed, to suggest to a potential client at a professional meeting, social gathering, or even at a country club that the firm could effectively handle the potential client's accounting needs. It was equally commonplace for a partner to directly approach corporations or commercial entities, either in person

or over the telephone, for the purpose of soliciting their business. Typically, a partner would make contact for the purpose of asking that the company entertain a presentation made by a member of the firm -- which is aimed at convincing the company to try the firm's services. There was never even the suggestion that such activities were improper. Insofar as I understand it, neither New Jersey or Georgia law forbids direct, in-person solicitation. Moreover, the major professional association of accountants -- the American Institute of Certified Public Accountants ("AICPA") -- amended its rules in 1979 to delete the then-existing restriction on direct, in-person solicitation. See AICPA, Report of the Special Committee on Solicitation (1981). And, at least since January 1983, the rules of the Florida Institute of Certified Public Accountants have permitted direct, in-person solicitation, provided, or course, that it does not involve the use of false, misleading or deceptive statements. See Rule 502.

9. Indeed, when I founded my accounting practice in Haddonfield, New Jersey, I engaged in precisely these sort of solicitation activities. I would telephone and visit potential clients, and ask that a meeting be arranged during which we could discuss the business's accounting needs, and the particular services I offer.

10. I am advised by my attorney that one possible justification for Florida's categorical bar on in-person, direct, uninvited solicitation is the fear that CPAs, in their quest to obtain business, might engage in deception or misrepresentation, or might compromise their independence in performing public accounting functions. In my view, these are not

legitimate concerns in the accountancy field, especially where the CPA is seeking to secure a long-term commercial client. There are several reasons why these concerns are not well-founded.

A. First, they overlook that the target of this solicitation activity is generally a high-level management official, who is an experienced, hard-headed businessman or woman. They are not easy to deceive, even if an accountant were inclined to do so. Thus, given the CPAs' audience, it strikes me that there is little possibility of misrepresentation or deception.

B. Second, these justifications side-step the fact that CPAs like myself are seeking to establish a long-term relationship with a client; most accountancy work does not relate to one deal or one transaction. Rather, at least as performed by most CPAs who focus on tax matters like myself, accountancy is an ongoing relationship which, if it works well, spans years or decades. It simply makes no sense for a CPA seeking to obtain a long-term client to do so by engaging in misrepresentation or deception.

C. Third, these claims also overlook the nature of the underlying transaction. During any discussion between a CPA and prospective client, the pivotal issues are the client's needs and the CPA's experience, background, and areas of expertise. If there is a fit, then the parties will explore entering into an arrangement. The CPA recognizes, of course, that his or her qualifications are easily verified -- all the prospective client needs do is telephone former employers and current clients. The CPA also understands that most businesses will not hire a new CPA without

checking his or her references extensively. After all, the decision to hire a new CPA is not made lightly. CPAs are privy to all of the business's financial records, and, as a result, know a great deal about the business's strengths and weaknesses. Indeed, it [is] because of the sensitive role a CPA plays for his clients that Florida recognizes that communications between a client and a CPA relating to the client's financial condition are in many circumstances privileged. See Fla. Stat. § 473.316. Understandably, businesses exercise great caution in selecting CPAs, and this only underscores that it would be perilous, at best, for a CPA to misrepresent to a prospective client anything about his or her background, experience, or capabilities.

D. Fourth, this rationale fails to take into account the stringent sanctions the State Board of Accountancy has available to it if an accountant is found to have engaged in misrepresentation or deception in securing clients. Thus, engaging in fraudulent or deceptive conduct in an effort to obtain clients is prohibited by Fla. Stat. §§ 473.323(f) & (k) and is punishable by penalties ranging from license revocation to heavy fines. See Fla. Stat. §§ 473.323(3)(b) & (c). These penalties would further deter any CPA from engaging in deception or misrepresentation to attract clients. To the extent that the defendants argue that the ban on in-person solicitation is needed to ensure that the CPA exercises independence in conducting audits or other public accounting functions, that argument likewise ignores that the Board already forbids a CPA from expressing an opinion "unless he and his firm are independent with respect to such enterprise." Fla. Stat. § 473.315. Again, any violation of this

provision is punishable by license revocation or heavy fines. See Fla. Stat. §§ 473.323(3)(b) & (c).

11. Florida's categorical restriction on direct, in-person, uninvited solicitation has seriously hampered my ability to attract clients and build my practice, for the reasons set forth in paragraphs 7-9, supra.

12. The injury to my practice has been made even more severe by the inequity in Florida's anti-solicitation restriction, which applies only to CPAs. CPAs have many competitors: accountants, bookkeepers, tax preparers, and other financial professionals, all of whom perform many of the same functions as CPAs. They establish financial management systems, prepare financial reports, assist in bookkeeping, manage employee benefits, and prepare tax forms. While Florida does forbid non-CPAs from holding themselves as CPAs, Fla. Stat. §§ 473.322(1)(a) & (b) and from certifying audits and other public financial reports, id. § 473.322(1)(c), it does not limit in any other way the role of non-CPA financial professionals. Accordingly, Florida's solicitation ban discriminates against CPAs, to the advantage of other financial professionals, who can engage in precisely the solicitation activities from which CPAs are forbidden.

• • •

Pursuant to 28 U.S.C. § 1746, I hereby declare under the penalty of perjury that the foregoing is true and correct. Executed on December 6, 1988, Homestead, Florida.

Scott Fane

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SCOTT FANE,

Plaintiff,

vs. Civil Case No. TCA 88-40264-MMP

FRED H. EDENFIELD, JR., et al.,

Defendants.

AFFIDAVIT OF LOUIS W. DOONER

My name is Louis W. Dooner. I was born in Tampa, Florida, June 18, 1928, attended local secondary schools and graduated from the University of Florida with a major in accounting in 1953.

Since graduation from college I have been in public accounting except for one year (1957-58) when I was controller of Three Bays Steamship Co., Miami, Florida. My public accounting career began in 1953 when I joined the staff of Price Waterhouse & Co. in New York City. After four years with that firm in their New York, Hartford and Atlanta offices and following one year's absence from the profession I joined the staff of Morris and Grace, a local firm, in Coral Gables, Florida. In December of 1959 I moved to Quincy, Florida, to conduct a practice together with Mr. William D. Bell. This firm practices today under the name of Dooner, Edwards & Fletcher. In 1983 I became inactive in the day to day practice but serve as a consultant to the firm.

On December 27, 1979, I was appointed to the Florida Board of Accountancy and served as Chairman in 1981 and 1982. I was Chairman and/or a member of the Probable

Cause Panel in 1980 and from 1983 to January 5, 1988, when my term on the board expired.

I served as President of the Florida Institute of Certified Public Accountants and also served on numerous committees as a member and/or chairman, including legislative policy and long range planning for which I was named outstanding Committee Chairman. I held numerous offices in both local chapter and state wide.

I have been a member of the American Institute of Certified Public Accountants since 1959 and served as a member of Council (governing body) for seven years and as chairman of numerous committees and task forces, also served as a member of the Auditing Standards Board which promulgates Generally Accepted Auditing Standards and as a member for three years and as chairman for three years of State Legislation Committee.

As a member of the National Association of State Boards of Accountancy I served on numerous committees including the Committee on licensure and reciprocity and Committee on legislation and regulation. I also served as a member of the special committee on relations with government. I designed what has come to be known as the Florida Project whereby the Florida Board of Accountancy and the Regional Inspectors General for federal agencies entered into an agreement of cooperation to better regulate audits of organizations receiving federal funds. This project has now been adopted by and will soon be in place in thirty three states.

In November of 1988 I was named the Distinguished Alumnus of the Fisher School of Accounting, University of

Florida, by Beta Alpha Psi, national honorary accounting fraternity.

I have been asked by defendant in this case to set forth my opinion as to the need and appropriateness of the ban on direct, in-person, uninvited solicitation (rule 21A.24.002). My opinion as set forth below is based upon experiences as a practicing CPA and as a member of the Florida Board of Accountancy.

To more fully understand the ban on direct, in-person, uninvited solicitation by Certified Public Accountants in Florida it will be helpful to look briefly at the history of the profession in the United States.

In the late 1800's investors in England found that in order to be satisfied that their investments in America were being properly managed they enlisted the assistance of accountants to visit the business and report back as to the financial condition and results of operations of these far flung enterprises.

At first these accountants traveled from England, but with travel and communication being as limited as it was in those days it was found that it was far more efficient for the accountants to remain in America and perform the required audit services. Around 1890 the State of New York enacted the first state law to license and regulate Accountants rendering opinions on financial statements based on an audit of the accounting records of the enterprise. These licensees became known as certified public accountants. Their sole purpose was to render opinions on financial statements.

In the early 1900's the Florida legislature enacted a statute which provided for the licensure of qualified persons

to render independent opinions on financial statements of others based on an audit of their accounting records.

Our present accountancy law provides that Certified Public Accountants are the only persons who may render opinions on financial statements of others based on an audit conducted in accordance with Generally Accepted Auditing Standards. The independent opinion on financial statements is the only reason for the existence of a regulated public accounting profession.

As was stated earlier the profession was established for the purpose of auditing financial statements and it has been this function that has become so important to the financial community and to the economy of the United States. Without the independent audit it would be impossible to raise capital with which to finance industry. The profession has done an outstanding job in this area and has come to be one of the most highly respected and trusted professions in this country today.

Part of the development of this highly respected profession was the evolution of a code of conduct which assured the users of financial statements that the CPA who opined on the statements was independent of the subject of the statements and this independence had not been impaired in any way including the solicitation of the client. The auditor's independence means that he is so free of his client that he is willing to report the facts as they are found regardless that it may be detrimental to the client. If he has solicited the client he will be beholden to him.

In order to protect the integrity of opinions on financial statements public accountancy was defined to include all

services rendered to the public by a CPA involving the use of accounting skills. This has meant over the years that the CPA conducted himself in the same manner whether the service was an audit or some other service.

As the volume of other services expanded the strict code of conduct applicable to audits came to be a hindrance to some CPA's who wanted to expand through advertising, solicitation, payment of finder fees and other means. Many of these CPA's have no desire to perform audits and in fact do not. If they were not CPA's they would be free to conduct themselves in any legal manner they choose, rendering all services except audit without the burden of the high standards of the CPA.

The audit function is too important to the economic well being of this country to allow it to be torn down by a few who want the prestige and public trust that their predecessors have earned without being willing to continue to conduct themselves in a manner that will assure the continued integrity of opinions on financial statements. The ban on direct, in-person, uninvited solicitation is for the protection of users of financial statements. It is not to protect the public from solicitors.

It has been suggested that because the American Institute of Certified Public Accountants (AICPA) and the Florida Institute of Certified Public Accountants (FICPA) amended their rules to not prohibit direct, in-person, uninvited solicitation of a potential client, it means that these organizations are not in favor of such a ban. Nothing could be further from the truth. This action was taken initially by the AICPA to avoid action by the United States Department of Justice.

It was the opinion of legal counsel that such a ban by a private organization would not be permitted under the federal antitrust laws.

At the 1980 annual meeting of the AICPA a resolution was passed that called for a special committee to study the question and report back to the 1981 annual meeting which it did in the form of "Report of The Special Committee on Solicitation."

I served on that committee and can assure the court that the recommendations of that committee were not based on the fact that the members were desirous of eliminating the ban on direct, in-person, uninvited solicitation. The committee made five recommendations:

1. The AICPA Code of Professional Ethics should not contain a general prohibition of direct uninvited solicitation of potential clients or a narrower prohibition of oral direct uninvited solicitation of potential clients.

2. Rule 502 of the Code of Professional Conduct should be amended to prohibit certain forms of solicitation, as follows:

   Rule 502--Advertising and Other Forms of Solicitation. A member shall not seek to obtain clients by advertising or other forms of solicitation in a manner that is false, misleading, or deceptive. Solicitation by the use of coercion, duress, compulsion, intimidation, threats, overreaching, or vexatious or harassing conduct is prohibited.

3. The board of directors should issue a policy statement expressing its view that members should exercise appropriate restraint if they elect to engage in the commercial practices of advertising and solicitation.

4. The AICPA should not develop a program to influence state legislatures to adopt more stringent solicitation bans than the AICPA itself can impose.

5. The AICPA should not require its members to file with the AICPA copies of all direct uninvited promotional literature simultaneously with, or within a reasonable time after, its dissemination to potential clients.

As can be seen from the foregoing quotations from the Report of The Special Committee on Solicitation the primary concern of the committee was the affect on the AICPA and not the merits of the issue from the standpoint of the public interest. We were very much concerned that if action was taken by the FTC and the AICPA were require[d] to sign a consent agreement it would contain a proscription against ever making an utterance on the subject as had occurred in the past with regard to prohibition on competitive bidding. It was felt that we would be better off to not have the ban and have the ability to speak on the subject than to not have the ban and not have the ability .pa[sic] to speak on the subject.

The ban on direct, in-person, uninvited solicitation is extremely narrow and only proscribes the uninvited contact whereby the potential client is required to make a response. It may be helpful to look at what is permitted under this rule.

1. May a CPA attend trade shows, luncheon clubs and other such meetings and engage in direct, in-person, solicitation?

Yes, because those in attendance by their presence, have issued an invitation to be solicited.

2. May a CPA send a personal letter to a potential client requesting an appointment to discuss his qualifications to render services?

Yes, because the decision to enter into the conversation rest[s] with the potential client.

3. May a CPA send brochures and other advertising material to a particular member of management of a potential client?

Yes, this activity as in the previous example places the responsibility for initiating personal contact with the potential client.

The only type of solicitation that a CPA may not engage is that that places the potential client in the position of having to make an immediate oral response thus opening the door to overreaching and vexatious conduct by the CPA or conversely, and far more damaging to society, the opportunity for the potential client to place the soliciting CPA in a compromising position as part of the bargain reached since the CPA is obviously in need of business and may be willing to bend the rules. Such activity is not in the best interest of the public which is so dependent on independent opinions on financial statement[s] based on an audit conducted in accordance with generally accepted auditing standards.

* * *

Pursuant to 28 U.S.C. paragraph 1746, I hereby declare under the penalty of perjury that the foregoing is true and correct. Executed on January 4, 1989, Quincy, Florida.

_____

Louis W. Dooner

STATE OF FLORIDA
COUNTY OF GADSDEN

On this 3rd day of January, 1989, before me, personally appeared LOUIS W. DOONER, to be known and known to me to be the person described in and who executed the above instrument and acknowledged to me that he executed the same.

Deborah G. McMillan
NOTARY PUBLIC

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SCOTT FANE,

Plaintiff,

vs. Civil Case No. TCA 88-40264-MMP

FRED H. EDENFIELD, JR., et al.,

Defendants.

SUPPLEMENTAL AFFIDAVIT OF SCOTT FANE

1. I am the plaintiff in this action, and I submit this supplemental affidavit in further support of plaintiff's motion for summary judgment.

2. I have carefully read both the memorandum that the defendants filed in opposition to my motion for summary judgment and the affidavit of Mr. Louis W. Dooner, and I believe that there are two points that require clarification.

3. First, contrary to the impression that might be drawn from defendants' submissions, there are many CPAs in active practice who rarely, if ever, exercise the attest function. Generally, the attest function is employed to verify the accuracy of financial statements used to raise capital--either from lending institutions or investors. Thus, CPAs engaged in the preparation or audit of such financial statements regularly "attest" to their accuracy. On the other hand, accountants like myself who specialize in corporate and individual tax seldom, if ever, exercise the attest function. This is also true in a number of other areas in which other CPAs specialize: financial planning, employee

benefits, computer consulting, management information systems, estate planning and litigation support.

4. Thus, while the ability to attest to the accuracy of financial statements and audits is one factor that distinguishes CPAs from accountants and other financial professionals, it is only one of many factors, several of which may be even more important. To start with, CPAs alone are licensed, and hence have demonstrated their educational background, competence, expertise, and good moral character. Moreover, CPAs must take continuing education courses in accounting, and, for that reason, must maintain a high level of professionalism. Finally, certain communications between CPAs and their clients are privileged under Florida law, which is a critical distinction between CPAs and accountants. Most corporate clients, and many individual clients (particularly those who are wealthy), rely heavily on the fact that discussions with their CPAs are entirely confidential, and the ability to assure confidential handling of sensitive financial information is often the cornerstone of a CPA's relationship with a client.

5. Second, defendants' submissions can also be read to imply that a face-to-face solicitation, where the prospective client plays no role in initiating the conversation, is somehow fraught with the danger that in such circumstances a CPA might be willing to surrender his independence in order to secure business, and, conversely, a business may be inclined to attempt to entice a CPA to compromise his integrity. Indeed, defendants even suggest that a CPA engaged in solicitation may be more "willing to bend the rules" than CPAs who do not solicit.

6. Having practiced as a CPA and accountant in jurisdictions that do not prohibit direct, uninvited solicitation, I have extensive experience with in-person, direct, uninvited solicitation of clients by CPAs. I have engaged in such soliciation [sic] myself when I was in solo practice, and I have been employed at CPA firms--including two major, national firms--that also engaged in such solicitation. I am unaware of any instance in which, during the course of such solicitation, a CPA offered to give-up his independence to secure a client or a business sought to entice a CPA to compromise his integrity by promising to send the CPA its work. In light of my experience, and in my professional opinion, that scenario is inherently implausible. To start with, there are powerful deterrents against such conduct by CPAs. Improperly exercising the attest function may well constitute fraud, which is both a crime and an intentional tort, and thus a CPA would be risking jail and financial ruin by knowingly engaging in such conduct. Moreover, if caught, the CPA would likely be stripped of his license, and subjected to public humiliation. For these reasons, CPAs are exceedingly careful before attesting to the accuracy of any financial information. Second, while a CPA engaged in direct solicitation is certainly seeking new business, generally his major interest is in securing long-term clients. Any businessman interested in obtaining a "clean" but undeserved financial opinion is, by definition, not a promising client.

7. While the defendants imply that the lack of familiarity between a CPA and potential client might be some sort of breeding ground for improper conduct, in my

experience, and based on my professional opinion, the opposite is true. The only situation in which I can imagine a CPA compromising his independence is where a long-term client, with whom the CPA has developed a close relationship, is in serious trouble and needs a "clean" financial opinion. Perhaps in those circumstances a CPA might be persuaded to bend the rules to help his client. Even in those circumstances, however, most CPAs would place their independence above the needs of their client, if for no other reasons than the enormous risks that giving a false certification would carry.

• • •

Pursuant to 28 U.S.C. § 1746, I hereby declare under the penalty of perjury that the foregoing is true and correct.

Scott Fane

Executed on: January 25, 1989

REPORT OF THE SPECIAL COMMITTEE ON SOLICITATION*

Table of Contents

	Page
Foreword	30
Recommendations	33
Research and Findings	42
Research Methodology	42
Evolution of AICPA Ethics Rules Pertaining to Solicitation	43
State CPA Society Rules	46
Boards of Accountancy Rules	47
Attitudinal Survey on Solicitation	48
Selection of Special Legal Counsel	50
Delineation of Charge	51
Exhibit A: Extracts from Model Code of Professional Conduct Rules Pertaining to Solicitation and Advertising	52
Appendix A: Results of the Attitudinal Survey on Direct Uninvited Solicitation	54
Appendix B: Attitudinal Survey of AICPA Members Selected on Statistical Sampling Basis--February 1981	63
Appendix C: Legal Opinion of Committee Legal Counsel	72

*Prepared by the American Institute of Certified Public Accountants ("AICPA").

Foreword

In early 1979, in the light of legal advice questioning the legality of the longstanding prohibition against direct uninvited solicitation and the prospect that the ban would be challenged by the United States Department of Justice, the membership of the American Institute of CPAs voted in a mail ballot to eliminate the ban. Developments since the lifting of that prohibition caused concern that the members of the profession were engaged in promotional practices that were detrimental to both the general public and the profession. This concern prompted a member at the AICPA's annual meeting on October 6, 1980, to introduce the following resolution:

WHEREAS, direct uninvited solicitation by certified public accountants is detrimental to the public interest and to the professional practice of accountancy, as it tends to diminish the Technical and Ethical Standards of the public accounting profession, and

WHEREAS, various state boards of accountancy and various state societies maintain prohibitions on direct uninvited solicitation, and

WHEREAS, certain state boards of accountancy have instituted proceedings against accounting practitioners who have violated these rules on direct uninvited solicitation, now, therefore, be it

RESOLVED, that the Chairman of the American Institute of Certified Public Accountants shall appoint a special committee to study the ramifications of the present status of rules pertaining to direct uninvited solicitation and the legality of such rules. The special committee shall consist of members from all segments of the membership in public practice. The special committee shall be empowered to request legal counsel of its own choosing, shall be empowered to communicate with state boards and state societies, and shall report its findings in a written report to the members of the American Institute of Certified Public Accountants at least one month prior to the AICPA Annual Meeting in 1981.

The resolution was adopted by an overwhelming majority of those present and became the charge to the Special Committee on Solicitation that was appointed the following month.

To provide a broad spectrum of professional experiences and views, the committee was composed of members from small, medium-sized, and national CPA firms, one member from industry and one member who was the executive director of a state CPA society. All members participated fully in the committee's activities and deliberations.

At its first meeting the committee decided that its research would be conducted most expeditiously through small working groups of its members. Six meetings of the full committee were held to deliberate the findings of the working groups' research and to arrive at the committee's conclusions and recommendations. The committee's research methodology is set forth in the section of this report titled "Research and Findings."

We suffered an incalculable loss in the death of our initial chairman, William R. Gregory. In his speeches as chairman of the board of directors in 1980 and in other writings, he continually decried what he saw to be a trend away from professionalism and toward commercialism. He believed the inevitable result would be a decline in the

profession's prestige and image in the eyes of the public. He viewed acts of direct uninvited solicitation as manifestations of that trend. His guidance as chairman in the early period of our work provided direction for our study and aided immeasurably in our completing our assignment in a timely manner. We acknowledge his significant contribution to our project.

Special Committee on Solicitation
William R. Gregory, Chairman
(November 20, 1980 to April 12, 1981)
Alan Brout, Chairman
(April 12, 1981 to conclusion)
Norman E. Auerbach
Louis W. Dooner
Charles R. McCann
A. Clayton Ostlund
Clinton J. Romig
Mahlon Rubin
Gordon H. Scheer
Jay T. Ward

Donald J. Schneeman, *General Counsel and Secretary*
William C. Bruschi, *Vice President--Review & Regulation*

September 1981

Recommendations

In arriving at our recommendations, we considered extensively the opinion and advice provided by legal counsel and the significance of the information obtained from our surveys of the AICPA membership, state societies, and boards of accountancy. The comments volunteered by interested members were also considered.

We conducted our study knowing, of course, that the AICPA membership had decided in a 1979 mail ballot to delete from the Institute's Code of Professional Ethics the prohibition against direct uninvited solicitation. Although that ballot, as is customary with such ballots, did not ask for the reasons members voted as they did, we believe that many voted to lift the ban to forestall antitrust action against the AICPA because they felt that the AICPA would have little chance of winning.

Our survey of the attitudes of AICPA members toward direct uninvited solicitation, described in this report, disclosed that a substantial number of members now believe that, were it legal to do so, the AICPA should reverse that 1979 decision and install and enforce a ban on direct uninvited solicitation. Responses revealed that many members are convinced that direct uninvited solicitation undermines the professionalism of CPAs. They are apprehensive of the impact of unbridled solicitation upon the public image of CPAs. While we share such concerns, nevertheless, the cold reality of today's business and legal environment must be recognized.

Through the 1970s, the professions, including CPAs, functioned largely in a self-governing environment. Since

then, the United States Supreme Court has made it clear that the learned professions are not exempt from the antitrust laws. Subsequent actions by federal and state authorities and court decisions have opened the way to sharply competitive practices among professionals.

Therefore, in response to the directive set forth in the 1980 Annual Meeting resolution, and after due consideration and discussion of our findings and the opinion provided by legal counsel, we make the following recommendations:

1. ***The AICPA Code of Professional Ethics should not contain a general prohibition of direct uninvited solicitation of potential clients or a narrower prohibition of oral direct uninvited solicitation of potential clients.***

In arriving at this recommendation, we were strongly persuaded by the opinion of legal counsel that such prohibitions would run a substantial antitrust risk. In all likelihood, the Justice Department would institute an antitrust action challenging the ban. Such a suit was recommended in August 1978 by the department's antitrust staff when the AICPA Code of Professional Ethics prohibited direct uninvited solicitation. The recommendation was aborted only after the AICPA's membership voted in March 1979 to eliminate the prohibition. The AICPA's prominent position in professional circles and the publicity that would follow adoption of the ban would undoubtedly focus the attention of the Justice Department once more on the AICPA.

The prevailing attitude of the Justice Department was expressed in September 1979 when the chief of the antitrust division's special litigation section stated that, in the Justice Department's view, a blanket ban on written and oral solicitation by accountants "substantially impedes the

ordinary give and take of the marketplace and under cases like [*Professional Engineers, Texas State Board of Public Accountancy, and American Institute of Architects*] would be illegal under the antitrust laws absent the state-action exemption."[1]

Counsel also points out that the trend of case law and the absence of persuasive evidence that direct uninvited solicitation by CPAs is likely to lead to false or misleading claims or oppressive conduct make it unlikely that the ban would be upheld in a judicial proceeding. While we do not want to toss in the towel in a legal fight before it begins, nevertheless, the realities of the profession's situation must be recognized.

To the likelihood that the AICPA would not prevail in a court suit must be added the financial burden that would be incurred by the AICPA. Counsel advises that the legal cost of such a suit would be in excess of $1 million. While we acknowledge that the AICPA should not flinch at legal fees for a cause that is likely to succeed, an expenditure of substantial sums is unwarranted when there is little chance of success.

Another potential cost to the AICPA could be the loss of its present ability to speak in a negative tone on the subject of, or to issue cautionary guidance to its members in, the

---

[1]Letter, J.W. Poole to P.M. Bluhm, Vermont legislative draftsman (September 7, 1979). The "state-action exemption" is a doctrine that confers immunity from antitrust law for a restraint of trade which is clearly articulated and affirmatively expressed as state policy and is actively supervised by the state itself. For further discussion, see the legal opinion of Kaye, Scholer, Fierman, Hays & Handler, Appendix C, page 71, herein.

matter of solicitation practices. It is commonplace for court decisions in injunctive actions not only to order curtailment of the offending practice but to outlaw otherwise lawful practices in order to achieve what the court regards as effective relief. Indeed, the AICPA has already been a victim of this judicial doctrine as a result of the consent decree it entered into on July 1, 1972, to settle a suit seeking to eliminate former rule 303 of the Code of Professional Ethics, which prohibited competitive bidding.[2]

Yet another cost--intangible in nature--could be the profession's loss of prestige in the event of an adverse decision. The AICPA's failure to sustain in court its policy position that the ban on solicitation is in the public interest could lead the public to conclude that the ban was designed to serve the profession's interests alone. CPAs enjoy a reputation as objective, conservative, public-intentioned professionals. An adverse decision in a legal proceeding in which the public interest is an issue could tarnish the profession's image.

During our study we were cognizant of the arguments advanced by some members that a ban on direct uninvited solicitation could be justified on the grounds that the unique requirement for CPAs to be independent in audit and review engagements could be the basis for justifying the ban under antitrust law. The supporting argument was that a CPA who obtained a client through direct uninvited solicitation would

[2]United States v. American Institute of Certified Public Accountants, Inc., 1972 Trade Cas. ¶74,007 (D.D.C. 1972).

not have the requisite objectivity of mental attitude required for a CPA's independence of the client.

We were also aware of the theory advanced by Philip L. Defliese, past chairman of the AICPA Board of Directors, that the independence in mental attitude of an incumbent auditor could be impaired if, during the course of an audit engagement, the auditor becomes aware that the client is being solicited by another auditor. Mr. Defliese expressed his theory as follows:

> The independent auditor's position is unique in that he has two clients--the company he is auditing and the person relying on his opinion on the financial statements: the prospective investor or general public. Only through an independent approach to his task can the reliability of his opinion be assured. The threat of the loss of an engagement, or the need to lower his fee (and possibly impair quality), while he is so engaged may consciously or subconsciously affect his independent attitude toward the management he is auditing. This can injure the public interest.[3]

While we know that those theories on the impact of solicitation on independence have some support in professional circles, we have concluded that there is no practical way to prove their validity.

We were advised that the argument that a ban on direct uninvited solicitation of audit clients is needed to assure auditor independence was advanced by AICPA representatives in discussions in 1978 with the Justice Department's

[3]Letter, Philip L. Defliese to State Board for Public Accountancy, the University of the State of New York (November 26, 1980).

antitrust division. The argument was rejected in the absence of empirical data.[4]

The survey of boards of accountancy brought to our attention correspondence between the Vermont State Board of Accountancy and the Vermont Attorney General. In that correspondence, the Vermont board argued that its rule 5.17 "restricting solicitation is based on the need for independent auditors to maintain an absolute independence in fact and in appearance."[5] The argument was rejected by the Vermont Attorney General's office as follows:

> It is our opinion that Rule 5.17 may violate both the antitrust laws and the First Amendment. Although it is impossible to say with absolute certainty how a court would decide if faced with these issues, we believe that the trend of recent cases strongly suggests that it would strike down the regulation on both antitrust and constitutional grounds.[6]

We are unaware of the existence of any empirical data supporting the theories that CPAs (a) are not independent of clients obtained by direct uninvited solicitation or (b) do not maintain their independence in mental attitude toward those clients subjected to direct uninvited solicitation by another

---

[4]Even if such data were available, the committee's legal counsel advises that it would not justify a total prohibition of direct uninvited solicitation, oral or written, but only a narrow ban on solicitation of audit and review engagements.

[5]Letter, Roderic A. Sherman, chairman, Vermont State Board of Public Accountancy, to Jay I. Ashman, Vermont Assistant Attorney General (August 20, 1979).

[6]Letter, Jay I. Ashman, Vermont Assistant Attorney General, to P.M. Bluhm, Vermont Legislative draftsman (September 6, 1979).

CPA. We have heard allegations by some CPAs that the independence of CPAs would be impaired under those conditions, but many CPAs do not agree that their own independence would be impaired.

Furthermore, our survey of members' attitudes disclosed that a preponderance of the AICPA membership believes that direct uninvited solicitation to acquire clients does not impinge on the independence of CPAs. The survey disclosed that 11 percent were in "total agreement" with the proposition that impairment occurred, whereas 34 percent were in "total disagreement."

Some contend that solicitation results in substandard work by CPAs who short-cut audit standards or skirt generally accepted accounting principles. The AICPA Rules of Conduct require adherence to generally accepted auditing standards and generally accepted accounting principles no mater how the client is acquired. The technical performance of CPAs is subject to investigation and evaluation regardless of the presence or absence of a ban on direct uninvited solicitation.

2. ***Rule 502 of the Code of Professional Conduct should be amended to prohibit certain forms of solicitation, as follows:***

   Rule 502--Advertising and Other Forms of Solicitation. A member shall not seek to obtain clients by advertising or other forms of solicitation in a manner that is false, misleading, or deceptive. *Solicitation by the use of coercion, duress, compulsion, intimidation, threats, overreaching, or vexatious or harassing conduct is prohibited.* (Amendment in italics).

A legitimate concern of the AICPA is the prohibition of unscrupulous solicitation practices. This proposed amend-

ment would ban solicitation activities of a nature that are detrimental to the public and to the profession. While instances of such solicitation may be rare, we have concluded that the prohibition would be useful.

Legal counsel advises that the amendment is likely to pass antitrust muster. Prohibitions of this type have been adopted and retained by some boards of accountancy even though a few of those boards are being required to eliminate broader solicitation bans on advice of their respective attorneys general.

3. ***The board of directors should issue a policy statement expressing its view that members should exercise appropriate restraint if they elect to engage in the commercial practices of advertising and solicitation.***

The relaxation of ethics rules pertaining to solicitation, including advertising, has resulted in increasing competition within the profession to acquire and retain clients. Excesses in those practices could cause the public's perception of the profession to change and the profession to suffer a serious loss of stature.

A policy statement issued by the board of directors would be a constant reminder of the possible consequences of rampant direct uninvited solicitation. At the same time the statement would make clear that direct uninvited solicitation practices not prohibited by rule 502 do not violate the AICPA Code of Professional Ethics and that no member will be disciplined for engaging in such conduct.[7]

---

[7]Rule 502, Advertising and Other Forms of Solicitation, reads as follows: "A member shall not seek to obtain clients by advertising or other forms of solicitation in a manner that is false,

Legal counsel advised that a nonenforceable policy statement of this type would not create a substantial antitrust risk since the board of directors has a right to express its opinion on the subject; nevertheless, it must be left to each member to decide what his course of action should be.

4. ***The AICPA should not develop a program to influence state legislatures to adopt more stringent solicitation bans than the AICPA itself can impose.***

In the opinion of legal counsel, the AICPA or a state CPA society would encounter little antitrust risk were it to petition state legislatures to enact statutes banning direct uninvited solicitation, and, since the resultant restraint would be the product of state action, it would be exempt from antitrust prohibitions.

Despite the allure of such legislatively enacted bans, we believe that the political climate would preclude state legislatures from passing such laws. We are also persuaded by counsel's opinion that such bans, if enacted by legislatures, would probably not survive constitutional challenge if applied to nondeceptive, noncoercive instances of solicitation.

5. **The AICPA should not require its members to file with the AICPA copies of all direct uninvited promotional literature simultaneously with, or within a reasonable time after, its dissemination to potential clients.**

Having been advised by legal counsel that such a requirement will not pose a significant antitrust risk, we gave serious consideration to establishing such a procedure but concluded that such a requirement would impose highly

---

misleading, or deceptive."

unpopular "red tape" procedures upon AICPA members. In our opinion, if the AICPA were to adopt this filing requirement, it would result in the creation of a new bureaucratic organization to sift through large quantities of paper for relatively few violations. We do not believe that the benefits derivable from such a program would warrant the considerable additional cost incurred.

Currently, the AICPA has the capability to deal with direct uninvited promotional practices that may be false, misleading, or deceptive through enforcement of rule 502, which prohibits those forms of solicitation. The AICPA Professional Ethics Division can deal with complaints filed under rule 502 and has the staff to do so.

Research and Findings

Research Methodology

At the outset of our study, we determined that the information needed for our deliberations could be obtained from research in the following areas:

- The evolution of the AICPA Rules of Conduct pertaining to solicitation.
- The current status of state CPA society prohibitions against direct uninvited solicitation.
- The current status of board of accountancy prohibitions against direct uninvited solicitation.
- The attitude of the AICPA membership towards direct uninvited solicitation.
- Current legal opinion regarding the various possible courses of action relative to solicitation rules.

To obtain general reactions of AICPA Council members to the committee's project, the agenda for the winter

regional meetings of Council members provided for discussion of our activities. In addition, Chairman Alan Brout reported some of our tentative conclusions at the spring meeting of Council.

Publicity attached to the formation and appointment of our committee resulted in a number of letters from members giving their views on direct uninvited solicitation.

Evolution of AICPA Ethics Rules Pertaining to Solicitation

The AICPA Code of Professional Ethics contains a rule against solicitation by false, misleading, or deceptive statements. The code has had rules pertaining to solicitation since the adoption of the first code in 1917. The wording of those rules was changed from time to time as the need was identified in ethics enforcement activities and in view of changed conditions. This brief history was prepared to provide an awareness of the evolution of the rules pertaining to solicitation.

In 1917, Council of the American Institute of Accountants, a predecessor organization to the AICPA, adopted the eight rules of conduct that constituted the Institute's initial Code of Professional Ethics. Rule 8 imposed a ban on solicitation of clients with the following language:

> No member shall directly or indirectly solicit the clients nor encroach upon the business of anpther member, but it is the right of any member to give proper service and advice to those asking such service or advice.

The creation of an associate class within the AIA membership led to a revision of the rule, which was adopted by a vote of the membership in 1941. The revised rule read:

> A member or an associate shall not directly or indirectly solicit the clients or encroach upon the practice of another public accountant, but it is the right of any member or associate to give proper service and advice to those asking such service or advice.

These two early rules prohibited solicitation of clients of other members or public accountants but were silent regarding solicitation of potential clients that had no existing professional commitments or understandings. The membership, by a vote in 1948, broadened the rule to apply the ban to all potential clients. The new rule also provided additional guidance and was worded as follows:

> A member shall not directly or indirectly solicit clients by circulars or advertising, nor by personal communication or interview not warranted by existing personal relations, and he shall not encroach upon the practice of another public accountant. A member may furnish service to those who request it.

The membership next decided, effective March 6, 1962, to separate the one rule into two, one pertaining to solicitation and the other to encroachment, as follows:

> 3.02. A member or associate shall not directly or indirectly solicit clients by circulars or advertisements, nor by personal communications or interview, not warranted by existing personal relationships.
>
> 5.02. A member shall not encroach upon the practice of another public accountant. A member or associate may furnish service to those who request it.

The ban on solicitation was made all-encompassing by the following rule adopted by the membership as of March 3, 1964:

> A member or associate shall not endeavor, directly or indirectly, to obtain clients by solicitation.

In a restatement of the AICPA Code of Professional Ethics, approved by the membership and effective March 1, 1973, bans on solicitation and advertising were combined as one rule. (The code had rules controlling or banning advertising dating back to 1919.) The new rule was this:

> Rule 5.02--Solicitation and Advertising. A member shall not seek to obtain clients by solicitation. Advertising is a form of solicitation and is prohibited.

The United States Supreme Court decisions in the *Goldfarb* case in 1975 and the *Bates* case in 1977 caused the AICPA to review the foregoing rule. Following the recommendations of the task force on advertising, a membership referendum was held that resulted in the adoption in 1978 of the following narrower rule:

> Rule 502--Advertising and Other Forms of Solicitation. A member shall not seek to obtain clients in a manner that is false, misleading, or deceptive. A direct uninvited solicitation of a specific potential client is prohibited.

As far back as 1973, the AICPA's advertising, solicitation, and encroachment rules had been the subject of an inquiry by the United States Department of Justice. The department did not contest the proposition that a rule prohibiting only "false, misleading, or deceptive" advertising conformed to existing law. The department, however, objected to the second sentence of the rule, which prohibited direct uninvited solicitation, since the resultant ban was not limited by the "false, misleading, or deceptive" standard.

In view of that objection and upon advice from AICPA legal counsel that it was doubtful the ban could be successfully defended, Council authorized, by a vote of 106 to 103, a mail ballot of the membership to repeal the prohibition

against direct uninvited solicitation by deleting the second sentence of the rule. To avoid any implication that Council was recommending a favorable vote of the membership on the proposed change, Council members requested that their feelings on the merits be recorded. Their vote was recorded as 130 against the proposed change and sixty-nine in favor.

The subsequent mail ballot of the membership resulted in a vote in favor of the proposed change. A total of 71,271 members participated in that ballot, representing 49 percent of the membership. Of those, 48,961 (68.7 percent) voted to delete the ban on direct uninvited solicitation. Accordingly, as of March 31, 1979, the following rule went into effect and is in effect at the date of the preparation of this report:

> Rule 502--Advertising and Other Forms of Solicitation. A member shall not seek to obtain clients in a manner that is false, misleading, or deceptive.

Court cases involving the legal issues we studied continue to arise, and AICPA monitors the resultant court opinions for their impact upon AICPA policy. One such case, which the United States Supreme Court has agreed to consider, captioned "*In the Matter of R.M.J.*," is an appeal of a Missouri Supreme Court decision and could define the limits of state power to regulate lawyer advertising.

State CPA Society Rules

To obtain knowledge of existing prohibitions against direct uninvited solicitation of potential clients in state society codes of ethics and other pertinent information, a survey questionnaire was distributed to the fifty-four CPA societies (the fifty states and the four other licensing

jurisdictions: District of Columbia, Guam, Puerto Rico, and the Virgin Islands).

A total of forty-six CPA societies responded to the questionnaire. An analysis of the responses revealed that five had bans on direct uninvited solicitation; one of the five, on the advice of legal counsel, was not enforcing its ban. Forty-one had lifted bans either through the application of a provision in their bylaws for automatic adoption of changes in the AICPA Code of Professional Ethics or through referendums of their memberships. In all societies that conducted referendums, the memberships voted to lift the bans.

Boards of Accountancy Rules

A questionnaire similar to that mailed to CPA societies was mailed to the fifty-four boards of accountancy to obtain knowledge of their prohibitions against direct uninvited solicitation of potential clients and other information.

Fifty-one boards responded to the survey. Twenty-eight boards stated that they had no prohibitions against solicitation or prohibited only false, misleading, or coercive statements. Twenty-three had prohibitions not limited to false, misleading, or coercive statements.[8] The majority of the boards having prohibitions have adopted the full rule of conduct pertaining to solicitation which was promulgated in 1977 by the National Association of State Boards of Accountancy (NASBA) in its Model Code of Professional

---

[8]Since the survey was made, one board has suspended enforcement of its ban and two other boards have dropped their bans.

Conduct. The full NASBA rule pertaining to solicitation and the related rule on advertising are set forth as exhibit A.

The attorneys general in three states with prohibitions in effect have objected to the prohibitions. Two of those boards are moving toward elimination of their prohibitions.

In the states with the full NASBA rule in effect, the attorneys general in three states have objected to part (c) of the rule. In addition, the chief of the Justice Department's antitrust division special litigation section took the position that part (c) of rule 404 would be illegal under antitrust law unless it resulted from valid state action that would give rise to antitrust exemption.[9] The committee is aware of only one state that has incorporated a ban against direct, in-person, uninvited solicitation into its accountancy statute to assure against antitrust attack.

Attitudinal Survey on Solicitation

To obtain information about the attitude of AICPA members toward direct uninvited solicitation, a survey was made of the AICPA membership. Gary Siegel, Ph.D., CPA, a member of the faculty of DePaul University and experienced in conducting attitudinal surveys including those of CPAs, was engaged as consultant to the committee for this project. Attached as Appendix B is a copy of the survey questionnaire.

The survey questionnaire was sent to a random sample of the AICPA membership, stratified according to types of employment, that is, national CPA firms, medium-sized or

---

[9]Letter, J.W. Poole to P.M. Bluhm, Vermont legislative draftsman (September 7, 1979).

local CPA firms, industry, government, education, and other. A total of 2,519 questionnaires were mailed, and we received 698 usable responses. In the opinion of Professor Siegel, the number of responses was large enough to warrant reliance upon the validity of the resultant data.

Professor Siegel's summary report of his analysis of the questionnaire data is attached as Appendix A. A detailed report of the analysis of the data is available from the AICPA Order Department upon request.

The committee believes that the most significant conclusions to be drawn from the data are the following:

1. There is widespread objection to the general practice of direct uninvited solicitation of potential clients.
2. Opinions vary regarding what actions constitute direct uninvited solicitation.
3. A majority believes that the AICPA Code of Professional Ethics should, if legally permissible, prohibit direct uninvited solicitation.
4. A substantial majority believes that direct uninvited solicitation does not lower the quality of services performed by CPAs.
5. A substantial majority also believes that direct uninvited solicitation does not impair independence in fact.
6. The attitudes of the members are generally the same regardless of their types of employment or geographic location. A difference was noted among members in public practice, however, in the attitudes of partners and sole practitioners compared to staff members. A similar correlation was found in terms of number of years the respondents were in public practice. The staff members and those with a lesser number of years of practice are somewhat more permissive in their attitudes toward direct uninvited solicitation and what acts constitute that practice.

Selection of Special Legal Counsel and Delineation of Charge

Selection of Special Legal Counsel

The committee recognized that its recommendations would be influenced by the advice of its legal counsel regarding what is legally feasible under antitrust laws and recent court decisions. Also, the committee took into account the recommendation of the AICPA Special Committee on Small and Medium-Sized Firms that the Institute engage outside counsel who has not previously advised the Institute on the impact of the antitrust laws on an ethics rule prohibiting direct uninvited solicitation.[10]

Accordingly, the following additional criteria were set for the selection of special legal counsel:

1. The firm must be recognized as an authority on antitrust law.
2. The firm should have a feeling for and knowledge of the environment and problems of the accounting profession and professional associations.
3. Firms that have provided legal services for major accounting firms would not be precluded from consideration except for those law firms that are the "lead" firms for major accounting firms.
4. The location of the firm was not critical, but a New York or Washington, D.C., firm would have easy access to the committee and staff.

After considering a number of firms, we selected Kaye, Scholer, Fierman, Hays & Handler, New York, N.Y., and

---

[10]Report of the Special Committee on Small and Medium-Sized Firms (New York: AICPA, 1980) p.23.

Stanley D. Robinson, a member of that firm, as our committee legal counsel.

Delineation of Charge

Mr. Robinson met with members of our committee to discuss the committee's assignment and to identify issues he might consider in developing his legal opinion. Those issues were presented as the following questions:

1. Can the prior broad rule prohibiting oral and written solicitation be reinstated in the AICPA Code of Professional Ethics?
2. If not, what is the broadest rule banning solicitation that can be established by the AICPA?
   a. Can oral solicitation be banned?
   b. Can solicitation of audit and review engagements be banned on the theory that the CPA's independence would otherwise be impaired?
3. If none of the foregoing can be accomplished, can the AICPA issue a nonenforceable policy statement outlining its views with respect to direct uninvited solicitation?
4. Can the AICPA seek to obtain a provision by state legislatures or boards of accountancy prohibiting direct uninvited solicitation, and would such a provision, if adopted, be enforceable? A summary of the firm's legal opinion is attached as Appendix C. The full legal opinion may be obtained from the AICPA Order Department upon request.

Exhibit A

National Association of State Boards of Accountancy

Extracts from Model Code of Professional Conduct Rules Pertaining to Solicitation and Advertising

Rule 404--*Solicitation.* A licensee shall not by any direct personal communication solicit an engagement to perform professional services (a) if the communication would violate Rule 403 if it were a public communication; or (b) by the use of coercion, duress, compulsion, intimidation, threats, overreaching, or vexatious or harassing conduct; or (c) where the engagement would be for a person or entity not already a client of the licensee, unless such person or entity has invited such a communication or is seeking to secure the performance of professional services and has not yet engaged another to perform them.

COMMENT: The Comment following Rule 403 is applicable here as well. It is reasonably clear that rules regarding solicitation may be tested by somewhat different legal criteria than those dealing with advertising; and accordingly, a separate rule seems called for.

Rule 403--*Advertising.* A licensee shall not use or participate in the use of any form of public communication having reference to his professional services which contains a false, fraudulent, misleading, deceptive or unfair statement or claim. A false, fraudulent, misleading, deceptive or unfair statement or claim includes but is not limited to a statement or claim which:

A. Contains a misrepresentation of fact; or

B. Is likely to mislead or deceive because it fails to make full disclosure of relevant facts; or
C. Contains any testimonial or laudatory statement, or other statement or implication that the licensee's professional services are of exceptional quality; or
D. Is intended or likely to create false or unjustified expectations of favorable results; or
E. Implies educational or professional attainments or licensing recognition not supported in fact; or
F. States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accountancy, if this is not the case; or
G. Represents that professional services can or will be competently performed for a stated fee when this is not the case, or makes representations with respect to fees for professional services that do not disclose all variables affecting the fees that will in fact be charged; or
H. Contains other representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived.

COMMENT: This Rule would be a marked departure from the common pattern of existing rules, which flatly ban all advertising. It is intended to reflect the current state of the law as to constitutionally permissible restrictions on advertising, as best it can be divined from the United States Supreme Court's decision in Bates v. State Bar of Arizona.

APPENDIX A

Results of the Attitudinal Survey on Direct Uninvited Solicitation

Summary Report
July 1981

Prepared for the Special Committee on Solicitation
American Institute of Certified Public Accountants

Conducted by
Gary Siegel, Ph.D., CPA.

Attitudinal Survey on Solicitation
Gary Siegel, Ph.D., CPA

Summary Report

The purpose of this study was to discover the opinions held by AICPA members toward direct uninvited solicitation of potential clients. Specifically, the committee sought to discover member viewpoints on (a) what constitutes direct uninvited solicitation, (b) how direct uninvited solicitation affects the public and the profession, (c) the relationship between solicitation and other forms of promotion, and (d) what to do about direct uninvited solicitation.

To achieve the study's objectives, the principal investigator developed a questionnaire based on input from the AICPA Special Committee on Solicitation. Two survey research professionals reviewed the questionnaire, and it was pre-tested on a sample of CPAs. After necessary modifications, the final version was mailed to a stratified random sample of 2,519 members of the American Institute of Certified Public Accountants in February 1981.

The questionnaires, together with a cover letter explaining the purpose of the study, were mailed without any respondent identification information to preserve anonymity. Thus, we did not know who completed the questionnaire, nor were we able to send follow-up questionnaires to nonrespondents. However, the possibility that respondent opinions differ from those of nonrespondents and, therefore, are not representative of all AICPA members is considered unlikely because of the wide divergence of viewpoints expressed by this large sample. Moreover, there is no basis for assuming that the nonrespondents are made up of people

with either strong positive attitudes or strong negative attitudes toward direct uninvited solicitation.

Considering the fact that no follow-ups were made to nonrespondents, the response rate was an excellent 27.7 percent; 698 usable questionnaires were returned.

The responses indicate that about two-thirds of the AICPA membership have negative attitudes toward direct uninvited solicitation. Partners in CPA firms and older CPAs hold stronger negative attitudes toward direct uninvited solicitation than dc staff members in CPA firms and younger CPAs. In fact, there is a direct relationship between age, or years in practice, and the intensity of negative attitudes toward direct uninvited solicitation.

A small segment--about 10 percent--of the membership holds extremely positive views toward direct uninvited solicitation.

Those who hold negative attitudes toward direct uninvited solicitation perceive greater differences between direct uninvited solicitation and other forms of promotion. Those who hold more positive attitudes toward direct uninvited solicitation see fewer differences between various types of promotion.

Based on current trends, and if no countervailing action is brought to bear on the situation, it appears likely that in the future, members' attitudes will become more positive toward direct uninvited solicitation and that the practice of direct uninvited solicitation will become more widespread.

What Is Direct Uninvited Solicitation?

In order to determine how members define direct uninvited solicitation, the questionnaire presented ten case-type

situations and asked respondents to indicate the extent to which each case was an example of direct uninvited solicitation.

The members believe that the act of handing a potential client a business card does not constitute direct uninvited solicitation. At the other extreme, they believe that writing letters or placing telephone calls to potential clients definitely constitutes direct uninvited solicitation.

There are, however, some ambiguities in member thinking about what constitutes direct uninvited solicitation. Suppose a CPA invites a potential client to lunch and to a tour of his firm's office. The membership is unsure whether this is or is not direct uninvited solicitation. Uncertainty is expressed, likewise, in a case where a CPA volunteers accounting information to a potential client and indicates his interest in being engaged to handle the problem at hand.

The membership believes that newspaper and trade journal advertising, while still part of that "gray area," tend to be definable as direct uninvited solicitation.

Thus, it appears that two factors are determining member thinking on this question. First, the more impersonal is the contact (for example, advertising, mass mailings, telephone campaigns), the more likely are members to categorize the act as an example of direct uninvited solicitation. Second, the farther removed is an act from a potential client's direct inquiry about an accounting question, the more likely will members view the act as an example of direct uninvited solicitation. Both factors must be considered. This would imply, for instance, that mass mailings to people who never requested information or to people whom

a CPA never met, would be an example of direct uninvited solicitation. Personal visits to people whom a CPA has met or who ask for information would not be considered direct uninvited solicitation. Areas of ambiguity are personal visits to people whom a CPA never met or who did not request information.

Effects of Solicitation on the Public and the Profession

The membership expresses slight disagreement with the notions that solicitation makes the public more aware of the profession's capabilities and that solicitation causes unsophisticated people to make decisions about CPA services that are not based on their own objective choice.

A greater amount of disagreement is expressed with the following statements: Solicitation helps the public make more informed decisions about selecting a CPA; solicitation lowers the quality of services CPAs render; and solicitation impairs the independence of CPAs.

The membership strongly disagrees with claims that a ban against direct uninvited solicitation violates the free speech of CPAs or denies the public opportunity to select CPAs on the basis of either cost or scope of services.

Respondents agree with the notions that direct uninvited solicitation adversely affects the public image of CPAs and that such solicitation would occur whether or not a ban exists.

The bulk of the membership believes that direct uninvited solicitation is not in the public interest, will tend to lower CPA fees, reduce the public's expectation of the quality of CPA services, and increase both litigation against CPAs and government regulation of the profession.

The membership is uncertain about the financial effect of direct uninvited solicitation on their careers.

Is Solicitation "Unprofessional"?

A large majority of the membership believes that direct uninvited solicitation is not professional. This belief is stronger among CPAs in public practice than among CPAs in industry. Of the CPAs in public practice, partners express stronger agreement with the statement that solicitation is unprofessional than do staff members. Also, older CPAs express stronger agreement with the statement than do younger CPAs.

Most members agree that direct uninvited solicitation by CPAs is comparable to "ambulance chasing" by lawyers. The only group of CPAs to disagree with this statement are the youngest AICPA members (less than five years in the accounting profession). On the other hand, all other age groups agree with the statement, and the extent of agreement varies directly with the years of experience in accounting.

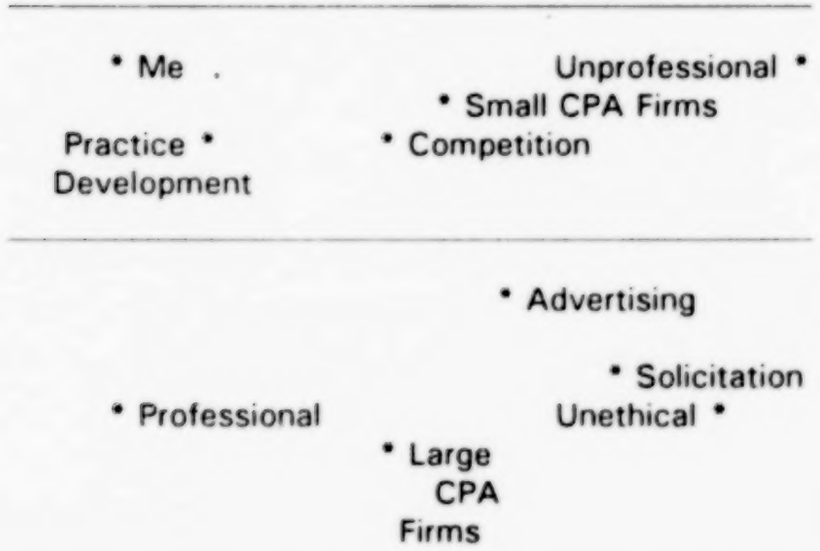
Solicitation and Other Forms of Promotion

The following statement was posited to AICPA members: "Direct uninvited solicitation is difficult to distinguish from other forms of promotion." The average respondent slightly disagrees with this statement. The membership appears to believe that, while it is possible to distinguish between direct uninvited solicitation and other forms of promotion, the apparent differences are sometimes indistinct.

In another part of the questionnaire, the membership was asked to respond to several paired comparison questions designed to determine how members perceive the relationships between various concepts. Using a statistical technique known as multidimensional scaling, it is possible to create a "map" of these perceived relationships. Figure 1 displays such a map for the entire sample.

Figure 1

Perceptual Map: Solicitation and Related Concepts



The location of the concepts in figure 1 is analogous to the location of cities on a physical map. Concepts close to each other are perceived to be more similar than are concepts farther from each other.

The concept "me" represents the average respondent. Respondents perceive concepts close to the "me" as psychologically near and identify with them. Concepts

farther from the "me" are psychologically distant and do not elicit identification.

In figure 1 "me" is close to "professional," and far from "unprofessional," thus, AICPA members do not consider themselves to be unprofessional. Also, the "me" is relatively close to "practice development" and "competition," which indicates that these concepts are acceptable to professional accountants.

The concepts "advertising" and "solicitation" are farther removed from "me" and are closer to the negative concepts "unprofessional" and "unethical." Thus, while practice development is considered to be "Professional," advertising and solicitation, on the other hand, are seen to be "unprofessional." Solicitation is closer to "unprofessional" and "unethical" than is advertising.

Comparative maps showing how members holding opposing views on solicitation perceive these relationships yield interesting results. Those who hold more positive attitudes toward solicitation show the concepts "advertising" and "solicitation" moving closer together and moving nearer to "competition," a concept with more positive connotations. At the same time "unprofessional" and "unethical" move farther away from the "me." Thus, for this group, the concepts "unprofessional" and "unethical" are much less relevant to the solicitation issue. These people see little difference between solicitation and advertising, and they consider both of these to be acceptable methods of competition or practice development.

For those who hold negative attitudes toward solicitation, the opposite occurs. The concepts "solicitation," "un-

ethical," and "unprofessional" converge. A greater distinction is seen between advertising and solicitation, and solicitation is seen as a less acceptable method of promotion.

Thus, if actions are based on the way people perceive a situation, it is likely that those who hold positive attitudes toward solicitation will engage in the practice of solicitation with greater frequency.

Member Opinion About Direct Uninvited Solicitation

The questionnaire asked members to assume that no legal or ethical ban exists against direct uninvited solicitation. Given this restraint, about 37 percent of the membership disagrees, with varying degrees of intensity, that direct uninvited solicitation should be banned by the AICPA Code of Ethics. About 11 percent are unsure, and 52 percent agree that it should be banned.

When the question was positively phrased, without assumptions about legal or ethical prohibitions, similar results were recorded. About 30 percent of the membership agrees, with varying degrees of intensity, that direct uninvited solicitation should be allowed by the AICPA. Ten percent are neutral, and 60 percent disagree that direct uninvited solicitation should be allowed.

APPENDIX B

Attitudinal Survey of AICPA Members Selected on Statistical Sampling Basis February 1981

Questionnaire

American Institute of Certified Public Accountants
Special Committee on Solicitation

Attitudinal Survey of AICPA Members
— Selected on Statistical Basis

1. To what extent are each of the following cases examples of solicitation? (Please respond to each of the following cases on a 0-100 scale.)

0		100
No Solicitation	Indirect Uninvited Solicitation	Direct Uninvited Solicitation

Your Rating

a. A CPA was seated next to the president of a corporation on a flight. During their conversation, the CPA explained the nature of his work and his ability to service such organizations. He gave the president his business card. ____

b. A CPA met the owner of a business at a benefit for a local arts organization. A week later the CPA invited the owner to lunch and to a tour of his firm's offices. ____

c. At a cocktail party, a CPA was asked for his views on an accounting question. The CPA, without getting into details, gave an overview of the issues involved. The next day, the CPA phoned the man who asked for his advice. The CPA volunteered more information and indicated his interest in being engaged to handle the problem. ____

d. In an effort to obtain more financial institutions as clients, a CPA mailed a letter to the top officer in **all** the banks and S&Ls in his area. The letter was addressed to the officer by **name and title** and requested the opportunity to meet with him. ____

e. In an effort to obtain more financial institutions as clients, a CPA mailed a letter to the top officer in **all** the banks and S&Ls in his area. The letter was addressed to the officer by **title only** and requested the opportunity to meet with him. ____

f. In an effort to obtain a financial institution as a client, a CPA mailed a letter to the top officer in a **particular** bank in his town. The letter was addressed to the officer by **name and title** and requested the opportunity to meet with him. ____

g. In an effort to obtain a financial institution as a client, a CPA mailed a letter to the top officer in a **particular** bank in his town. The letter was addressed to the officer by **title only** and requested the opportunity to meet with him. ____

h. A CPA firm had its partners telephone all retail furniture stores in its area to inform them about the firm's services. ____

i. A CPA firm placed an ad in a construction industry trade journal. The ad stressed the firm's high professional standards and urged contractors to call for a fee estimate. ____

j. A CPA firm placed an ad in a local newspaper. The ad stressed the firm's high professional standards and urged the readers to call for a fee estimate for tax return preparation. ____

2. For the questions in this section, **assume that there is no legal or ethical ban on direct uninvited solicitation**. (Using your own definition of direct uninvited solicitation, please respond to each item on a 0-100 scale, where zero indicates total disagreement and 100 indicates total agreement with the statement.)

0	100
Total Disagreement	Total Agreement

Your Rating

DIRECT UNINVITED SOLICITATION:

a. is not "professional" . . . . . ___
b. is difficult to distinguish from other forms of promotion . . . . . ___
c. should be banned by the AICPA Code of Professional Ethics . . . . . ___
d. is comparable to ambulance chasing by lawyers . . . . . ___
e. makes the public more aware of the CPA profession's capabilities . . . . . ___
f. helps the public make more informed decisions about selecting a CPA . . . . . ___
g. lowers the quality of services that CPAs render . . . . . ___
h. adversely affects the public image of CPAs . . . . . ___
i. impairs the independence of CPAs who acquire clients by this method . . . . . ___
j. would occur whether or not a ban exists . . . . . ___

99

k. causes unsophisticated individuals to make decisions about CPA services which are not based on their own free and objective choice . . . . . ___

3. People see things in terms of similarities and differences. For example, planes and trains, apples and oranges, and Republicans and Democrats are seen as similar in some respects and different in other respects.

(Please respond to each of the following on an open-ended scale where zero indicates no difference at all (i.e. complete similarity), and positive numbers express greater degrees of difference.)

For example, the difference between the concepts "lawyer" and "attorney" might be expressed as zero. The difference between the concepts "rugby" and "football" might be expressed as 50. The difference between the concepts "McGovern" and "Reagan" might be expressed as 70, 350, or 1000 or more, depending on your perceptions.

0	50	100	200	1000	>
No Difference	More Difference		More Difference		More Difference

97

IF THE DIFFERENCE BETWEEN DIRECT MAIL AND ADVERTISING IS 50, THEN HOW DIFFERENT ARE THE FOLLOWING CONCEPTS?

advertising and competition . . . . . ___
advertising and unethical . . . . . ___
advertising and professional . . . . . ___
advertising and me . . . . . ___
advertising and solicitation . . . . . ___
advertising and practice development . . . . ___

competition and unethical . . . . . ____
competition and professional . . . . . ____
competition and me . . . . . ____
competition and solicitation . . . . . ____
competition and practice development . . . ____
unethical and large CPA firms . . . . . ____
unethical and unprofessional . . . . . ____
unethical and small CPA firms . . . . . ____
me and large CPA firms . . . . . ____
me and unprofessional . . . . . ____
me and small CPA firms . . . . . ____
advertising and large CPA firms . . . . . ____
advertising and unprofessional . . . . . ____
advertising and small CPA firms . . . . . ____
competition and large CPA firms . . . . . ____
competition and unprofessional . . . . . ____
competition and small CPA firms . . . . . ____
solicitation and practice development . . . . ____
solicitation and large CPA firms . . . . . ____
solicitation and unprofessional . . . . . ____
solicitation and small CPA firms . . . . . ____
professional and me . . . . . ____
professional and solicitation . . . . . ____
professional and practice development . . . ____
professional and large CPA firms . . . . . ____
professional and unprofessional . . . . . ____
professional and small CPA firms . . . . . ____
me and solicitation . . . . . ____
me and practice development . . . . . ____
practice development and large CPA firms . ____
practice development and unprofessional . . . ____
practice development and small CPA firms . ____
unethical and professional . . . . . ____
unethical and me . . . . . ____
unethical and solicitation . . . . . ____
unethical and practice development . . . . . ____
large CPA firms and unprofessional . . . . . ____
large CPA firms and small CPA firms . . . . . ____
unprofessional and small CPA firms . . . . . ____

THE FOLLOWING PROMOTIONAL PRACTICES SHOULD BE ALLOWED BY THE AICPA CODE OF PROFESSIONAL ETHICS:

0	100
Total Disagreement	Total Agreement

a. Direct uninvited solicitation of potential clients . . . . . ____
b. Solicitation letters to the office of a potential client which are not address to a particular individual . . . . . ____
c. Solicitation letters addressed to a particular person in the potential client's firm . . . . . ____
d. Phone calls to solicit potential clients . . . . . ____
e. Any practice to solicit potential clients that is not false, misleading or deceptive . . . . . ____

5. Listed below are opposing effects of direct uninvited solicitation. The statement on the left has a rating of zero, and the statement on the right has a score of 100. (For each pair, enter a number from 0-100 indicating where on the scale you think the true effect of direct uninvited solicitation lies.)

			Your Rating
	DIRECT UNINVITED SOLICITATION:		
	0	100	
a.	is not in the public interest	is in the public interest	____
	0	100	
b.	lowers CPAs' fees	raises CPAs' fees	____
	0	100	
c.	adversely affects me financially	benefits me financially	____
	0	100	

d. lowers public expectations of the quality of CPA Services ____ raises public expectations of the quality of CPA services

0 ——— 100

e. will decrease litigation against CPAs ____ will increase litigation against CPAs

0 ——— 100

f. will decrease government regulation of CPAs ____ will increase government regulation of CPAs

6. For this set of questions, assume that direct uninvited solicitation is **prohibited** by the AICPA Code of Professional Ethics. Assume no conflict with state or federal laws. (Please respond to each item on a 1-100 scale, where zero indicates total disagreement and 100 indicates total agreement with the state.)

0 ——— 100

Total Disagreement — Total Agreement

Your Rating

A PROHIBITION IN THE AICPA CODE OF PROFESSIONAL ETHICS AGAINST DIRECT UNINVITED SOLICITATION:

a. is a violation of CPAs' freedom of speech ____
b. lessens competition among CPAs ____
c. denies potential clients the opportunity to choose a CPA on the basis of cost ____
d. denies potential clients the opportunity to choose a CPA on basis of scope of service ____
e. helps protect the public against deceptive and unscrupulous practices ____
f. prevents CPAs from encroaching on each others' practice ____
g. protects CPAs' clients from receiving information that plays on their fears ____

You and Your Environment

1. Where do you work?(circle one)
   Public Accounting:

Over 201 professional staff	1	Industry	5
51-200 professional staff	2	Government	6
50 or less professional staff	3	Education	7
Sole practitioner	4	Other	8

2. If you work in public accounting, what is your position in your firm?(circle one)
   Partner or owner 1
   Staff 2

3. How many years have you been working in accounting (public and/or private)?
   (enter number) ____ years

APPENDIX C

Kaye, Scholer, Fierman, Hays & Handler
425 Park Avenue
New York, N.Y. 10022

June 9, 1981

Special Committee on Solicitation
American Institute of Certified
Public Accountants
1211 Avenue of the Americas
New York, New York 10036

Gentlemen:

As counsel to the Special Committee on Solicitation, we are furnishing today to each Committee member a 121-page opinion letter setting forth our conclusions and underlying legal analysis with respect to the antitrust risks involved in various suggested courses of action which the American Institute of Certified Public Accountants ("AICPA") might take to cope with the problem of direct uninvited solicitation. At the Committee's request, we summarize below our conclusions for the benefit of the entire AICPA membership; we understand that the full text of our opinion letter will be on file with the Institute's General Counsel and will be available to any AICPA member who wishes to consult it.

1. *The AICPA could not unqualifiedly reimpose its prior ban on direct uninvited solicitation (both written and oral) without running a substantial antitrust risk.* The validity of such a ban would probably be governed by the rule of reason rather than condemned as illegal per se under the Sherman Act. However, given the present trend

of the case law, we believe it unlikely that the legality of the ban would be upheld in a rule-of-reason inquiry. That direct uninvited solicitation may be viewed as inconsistent with an accountant's professional image is not a permissible antitrust justification. Nor could such a sweeping prohibition--covering both written as well as oral solicitation--be successfully defended as a prophylactic measure to prevent otherwise undetectable instances of false, misleading or oppressive solicitation, since a less restrictive alternative exists for dealing with these problems, at least insofar as solicitation in written form is concerned. In that connection, the AICPA could, without incurring antitrust liability, require its members to file copies of all direct uninvited promotional literature simultaneously with, or within a reasonable time after, its dissemination to potential clients. By so doing, the AICPA could police written solicitation for instances of deception under the present version of Rule 502 of the Code of Professional Ethics, as well as for instances of overreaching or similar untoward conduct if the current ban were expanded along the lines suggested in Conclusion 4 below.*

2. *Given our present state of knowledge, the AICPA could not impose a ban on direct uninvited oral solicitation without running a substantial antitrust risk.* Even this more limited ban would probably be deemed an unreasonable restraint of trade, despite the fact that a better argument can be made for the need for a prophylactic prohibition to prevent instances of false, misleading and oppressive oral

---

*Obviously, the cost and burden of administering such a filing requirement would be significant.

solicitation which are extremely difficult to detect and prove absent a written record. The difficulty with the argument is that the AICPA would be obligated in an antitrust action to demonstrate factually that direct uninvited oral solicitation is likely to lead to false, misleading or deceptive claims or oppressive conduct, thus justifying the need for prophylaxis and offsetting the presumed anti-competitive consequences of the prohibition. Based on the record thus far available to us--including the State Board and State CPA Society responses to the Special Committee's questionnaire--we are unaware of any body of empirical data which would satisfy this burden. This is not to suggest that such data is non-existent; it simply has not been brought to our attention. Moreover, even if such a factual showing could be made, it would not necessarily assure that the ban would be sustained; it would still be left to the trier of facts to determine whether the evidence was sufficiently compelling to justify the ban.

3. *Absent a factual showing that direct uninvited solicitation is likely to impair auditors' independence in fact or is likely to be perceived as so doing by users of financial statements, the AICPA could not impose a ban on direct uninvited solicitation of audit and review engagements without running a substantial antitrust risk.* We believe that the preservation of an auditor's independence in fact or appearance would constitute a permissible rule-of-reason justification, since the SEC has repeatedly recognized that independence is essential to protect the public's reliance on audited financial statements. However, to support a ban on direct uninvited solicitation of audit and review engagements, the AICPA would have to prove that such conduct is likely to impair the independence of accountants in fact or is likely to be perceived as so doing by users of financial statements; and we are presently unaware of any empirical data which would sustain this burden. On the contrary, according to the results of the Special Committee's attitudinal survey, the AICPA membership itself does not feel strongly that direct uninvited solicitation poses a serious threat to independence. Moreover, the SEC has given no indication since the AICPA eliminated its prior ban on direct uninvited solicitation that it is concerned that this practice will unduly compromise independence in fact or in appearance.

4. *Without running a substantial antitrust risk, the AICPA could enlarge its existing ban on false, misleading and deceptive solicitation to also proscribe solicitation involving coercion, duress, compulsion, intimidation, threats, overreaching or vexatious or harassing conduct.* The elimination of deception is a permissible antitrust justification under the rule of reason, and we believe that preventing overreaching and other types of untoward conduct should stand on an equal footing. Indeed, a Justice Department spokesman has indicated that a ban on solicitation by accountants involving coercion, duress, compulsion, intimidation, threats, overreaching or vexatious or harassing conduct would pass antitrust muster.

5. *Without running a substantial antitrust risk, the AICPA Board of Directors could issue a non-enforceable policy statement underscoring the potential dangers to the public and the profession created by direct uninvited solici-*

tation. So long as the Board makes it clear that no AICPA member will be disciplined for engaging in any form of solicitation not expressly proscribed by Rule 502--thus eliminating the threat of professional sanction in those instances--the Board's issuance of such a policy statement would not in our opinion be vulnerable to antitrust attack.

6. *Without running a substantial antitrust risk, the AICPA could engage in a concerted lobbying campaign to secure state legislative bans on direct uninvited solicitation which the antitrust laws would preclude the AICPA itself from adopting; moreover, such legislative bans, if enacted and enforced, would likely be immune from antitrust attack. However, such state-imposed bans would probably be held unconstitutional by the United States Supreme Court as violative of the First Amendment.* Concerted lobbying efforts aimed at securing such state legislative bans would be immune from antitrust liability under the so-called *Noerr-Pennington* doctrine. Moreover, the enactment of such legislative bans and their enforcement by appropriate state agencies would be protected from antitrust attack by the so-called state action doctrine. On the other hand, it would be more risky for the AICPA to lobby state accountancy boards to promulgate such bans because of the substantial overlap in identity between AICPA and State Board members; and it is far from clear that such promulgation would be exempt from antitrust challenge under the state action doctrine. In any event, it is our opinion that any state ban on non-deceptive written solicitation by accountants would be struck down as unconstitutional by the United States Supreme Court. Moreover, although we are less certain, a

careful reading of the United States Supreme Court's opinion in the *Ohralik* case, involving the application of a state no-solicitation rule to ambulance chasing by attorneys, leads us to conclude that that Court probably would hold unconstitutional a state ban on direct uninvited oral solicitation by accountants if applied to non-deceptive communications in non-coercive circumstances. Finally, in our judgment, a state ban on direct uninvited solicitation of audit and review engagements would probably not survive constitutional challenge absent a showing that such conduct is likely to impair auditors' independence in fact or be perceived as so doing by users of financial statements.

Very truly yours,
Kaye, Scholer, Fierman,
Hays & Handler

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SCOTT FANE,
Plaintiff,

vs. Civil Case No. TCA 88-40264-MMP

FRED H. EDENFIELD, JR.,
et al.,
Defendants.

ORDER

This case comes before the court on plaintiff's motion for summary judgement (Doc. 13). The court heard oral argument and has reviewed all affidavits, exhibits, and memoranda submitted by the parties in making its decision. The plaintiff is entitled to summary judgement as a matter of law, and his motion is GRANTED to the extent discussed below. See Fed. R. Civ. P. 56; Rollings v. TechSouth, Inc., 833 F.2d 1525 (11th Cir. 1987).

I. STATEMENT OF THE CASE

The plaintiff, Scott Fane, is a certified public accountant licensed to practice in Florida. Mr. Fane moved from New Jersey to Florida in 1985 and seeks to establish an accountancy practice. In order to build his clientele, he wants to engage in direct, in-person, uninvited[1] solicitation of poten-

[1]Defendants concede that Florida's regulations do not prohibit direct, in-person, invited solicitation. The state's definition of "invited" is rather broad. For example, a general business discussion during a social gathering invites solicitation. See Defendants' Response to Motion for Summary Judgement (Doc. 23, pp.315-16).

tial clients. He is precluded from doing so by Rule 21A-24.002 of the Florida Administrative Code[2] which specifically prohibits this type of commercial speech. The defendant does not dispute that the rules restrict truthful commercial speech about lawful activities, and thereby raise first and fourteenth amendment issues. The present debate centers on whether the restrictions pass constitutional muster in light of recent Supreme Court decisions upholding similar restrictions on attorney solicitation.

The defendant asserts that the primary objective of the rule is to protect the CPA's integrity, independence, and objectivity while performing the "attest function." The "attest function" is the issuance of an independent opinion regarding a client's financial soundness based on an audit or review of a client's financial statements.[3]

In addition to protecting CPA's and the attest function, the restriction seeks to prevent solicited clients from luring the CPA into a collusive relationship whereby a fraudulent

[2]Section 21A-24.002(2) provides "[a] licensee shall not by any direct, in-person, uninvited solicitation solicit an engagement to perform public accounting services . . . [c] where the engagement would be for a person or entity not already a client of the licensee, unless such person or entity has invited such communication. Section 21A-24.002(3) makes unlawful "any communication which directly or indirectly requests an immediate oral response from the recipient."

[3]Only CPA's perform the attest function, therefore the prohibition does not restrict other providers of related financial services. Although that point seems to dispose of the plaintiff's equal protection argument, this court concludes that the regulation is unconstitutional on other grounds, and never reaches the merits of that claim.

attestation is issued. Such attestations may be used to deceive third parties. Those third parties may be the client's business associates or members of the general public who rely on the CPA's attestation. Additionally, the defendant seeks to preserve the restriction as a way to avoid the difficulties of proving and punishing CPA misconduct.

The defendant claims that the validity of these interests and the means used to serve them are supported by analogy to the Supreme Court's analysis in its series of attorney solicitation cases. (See Shapero v. Kentucky Bar Association, 486 U.S. 466, 108 S.Ct. 1916 (1988) (personalized mailings to potential clients with foreclosure problems); Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985) (printed advertisements directed to drunk drivers and Dalkon shield users); Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978) (direct, in-person, uninvited solicitation of accident victims). However, a careful analysis of that series of cases compels the opposite conclusion.

II. INTRODUCTION

Government suppression of the free flow of truthful commercial speech regarding lawful activities should be tolerated only when a substantial government interest is being served by regulations which directly advance that interest. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 638 (1985) (citing Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566 (1980)). Furthermore, those regulations must be narrowly tailored to achieve the desired objective. Board of Trustees of State

University of New York v. Fox, 109 S.Ct. 3028, 3035 (1989) (least restrictive means test explicitly rejected).

The defendant asserts that the justifications for banning direct, in-person, uninvited solicitation by attorneys supports a similar ban on like solicitation by CPA's. The Supreme Court's rationale for upholding the ban on attorney solicitation focuses on two general concerns or factors uniquely associated with attorneys: the possibility of undue influence and overreaching, and the absence of regulatory control. Shapero v. Kentucky Bar Association, 486 U.S. 466, 475, 108 S.Ct. 1916, 1922 (1988). When applied to the present case, this analysis reveals that those concerns are not present in the context of direct, in-person, uninvited solicitation by CPA's. Even if such concerns were found to be present, a logical distinction between the different types of CPA solicitation could not be made to justify their different treatments.

III. THF FIRST FACTOR

The Supreme Court emphasized in its most recent attorney solicitation decision that "[i]n assessing the potential for over-reaching and undue influence, the mode of communication makes all the difference." Shapero v. Kentucky Bar Association, 486 U.S. 466, 475, 108 S.Ct. 1916, 1922 (1988). In Shapero, the Court struck down a ban on attorneys' direct mailings to potential clients with known particular problems. Id. In Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985), the Court used similar reasoning in striking down a rule which prohibited newspaper advertising by attorneys. In contrast, the Court in Ohralik v. Ohio State

Bar Association, 436 U.S. 447 (1978), upheld an unqualified ban on direct, in-person, uninvited solicitation of potential clients by attorneys.

In the above cases, the Court recognized that the dangers associated with in-person attorney solicitation which justify its absolute prohibition are not sufficiently strong with respect to other forms of solicitation to warrant similarly harsh treatment. Shapero, 486 U.S. at 472, 108 S.Ct. at 1921; Zauderer, 471 U.S. at 641; Ohralik, 436 U.S. at 465. The dangers associated with direct, in-person, uninvited solicitation by attorneys stem from the profession's training: this background increases the client's susceptibility to exploitation. Shapero, 486 U.S. at 475, 108 S.Ct. at 1922; Zauderer, 471 U.S. at 642; Ohralik, 436 U.S. at 465-66. The relevant focus must be on the solicitor's training and opportunity to use this training when engaged in a particular mode of communication. Comparing the dangers threatened by CPA solicitation to the dangers associated with similar solicitation by attorneys reveals the weaknesses in defendants' argument.

First, the professional training of attorneys and CPA's is different. An attorney is "a professional trained in the art of persuasion." Ohralik, 436 U.S. at 465. Unlike other forms of attorney solicitation, face-to-face solicitation allows the attorney a chance to practice this art. Zauderer, 471 U.S. at 641 (direct solicitation involves "the coercive force of the personal presence of a trained advocate"). Furthermore, the unique behaviors associated with attorneys warrant more restrictive regulations involving in-person solicitation. Shapero, 486 U.S. at 472, 108 S.Ct. at 1921. The Supreme Court has expressed concern about the potential client's inability to avoid "a badgering advocate breathing down his neck." Shapero, 486 U.S. at 475, 108 S.Ct. at 1922. Consequently, when lawyers are engaged in direct, in-person, uninvited solicitation as compared to other sellers of goods or services, "it hardly need be said that the potential for over-reaching is significantly greater." Id.

The Fourth Circuit extended this reasoning in upholding a ban on certain types of solicitation (including in-person) by people selling preneed funeral contracts. National Funeral Services, Inc. v. Rockefeller, 870 F.2d 136 (4th Cir. 1989), cert denied, 110 S.Ct. 409. The court noted the peculiarity of upholding a ban outside of the attorney context, noting the very "unique nature" of preneed funeral contract solicitation. Id. at 143 n.11. Judge Hall noted the uncommon similarities which warranted the analogy between preneed funeral contract and attorney solicitation as follows: "In both, an advocate trained in the art of persuasion is trying to convince an emotionally vulnerable layperson that he needs professional services." Id.

In contrast, CPA's are not trained to be coercive, persuasive, or to take particular advantage of a face-to-face situation: their training emphasizes independence and objectivity. In light of the distinctive training given attorneys, the defendant cannot analogize to those Supreme Court decisions which deal with attorney solicitation to justify its ban on direct, in-person, uninvited solicitation by CPA's. The dangers associated with in-person solicitation by uniquely trained attorneys simply are not present in the CPA context.

Second, the effect on the potential client from an attorney's direct, in-person, uninvited solicitation is substantially different from the effect when the same solicitation comes from a CPA. The two groups of potential clients that are targeted for solicitation are in significantly different positions. An attorney identifies a potential client by his "adverse conditions." Ohralik v. Ohio State Bar Association, 436 U.S. 447, 465 (1978). Usually, the attorney solicits "victims of misfortune."[4] The ban on attorney solicitation guards against invasions of privacy and additional distress. Id. Such dangers are present regardless of the attorney's style of approach or intentions. Id. at 465 n.25.

Another factor which enhances the likelihood of exploitation is the client's lack of sophistication about legal matters and services. Id. at 465 n.24. Thus, it is very likely that an attorney will be able to pressure the potential client into immediately accepting services that she may not need or want. The client may be left without the benefit of reflection, others' advice, or exploration of the available alternatives. Id. at 457.

Whereas attorneys may zero in on an "unsophisticated, injured or distressed lay person," Id. at 465, certified public accountants prefer to solicit prosperous business people as potential clients. These people tend to be knowledgeable

[4]This court recognizes that some potential clients of attorneys will be in the same position as potential clients of accountants. Though these persons are objectively in the same position, the attorney's potential client is quite likely to be in adverse conditions, and will be confronted by a uniquely trained individual. These differences serve to distinguish objectively similar situations.

about financial matters and successful enough to require specialized accounting services: they know what they need and whether the accountant can fulfill this need. Furthermore, the solicitation usually takes place in a business setting, a place where the potential client will not feel intimidated. Thus, the defendant cannot argue that the CPA solicitation regulation protects the potential client from harms which are likely to accompany the prohibited type of attorney solicitation.

Additionally, the defendant suggests that the disputed regulation prevents fraudulent attestations, thereby insuring that third parties will not rely on such to their detriment. Given the direct advancement requirement of Central Hudson,[5] the defendant's efforts to protect parties outside the professional relationship from indirect harm, though understandable, is inappropriate.

Even assuming that protection of third parties is appropriate, several significant problems remain with the defendant's argument. First, there is a causation problem when we try to link the alleged misconduct of the CPA with the harm incurred by the third party. Apparently, the defendant is concerned that the client will exert undue influence on the CPA and exploit a face-to-face confrontation to persuade the CPA to commit a fraud. Ultimately, this assertion posits that the client is using the CPA to deceive that client's business associates or members of the general public about her financial soundness. The defendant seems to encourage regulating the innocent and valuable activities of one group

[6]See discussion above, at p.1.

to forestall the criminal activities of another. The link between regulation and forbidden activities seems quite tenuous, if at all existent.

Second, there are problems with the defendant's suggestion that a CPA who uses direct, in-person, uninvited solicitation is more likely to commit fraud than a CPA who uses other forms of solicitation. The differences between the prohibited solicitation and direct mailings, for example, seem far too superficial: in both cases, the eventual face-to-face will give rise to possibilities for collusive and improper behavior. Thus, even if we assume that there exists a causal link between solicitation and misconduct, the defendant's varying treatment of different modes of solicitation is not justified.

Third, the defendant's implicit assumption that a client is more likely to approach an unknown CPA about illegal activities is unfounded. The more logical assumption is that such a client would more likely approach a known CPA with whom she has a long-standing and mutually profitable relationship: the client is more likely to trust such a person and the CPA has more to lose (i.e. an established client) by refusing to cooperate.

As the preceding clearly demonstrates, the defendant has failed to demonstrate a causal relationship between in-person, direct, uninvited solicitation, and accountant misconduct. Similarly, the defendant has failed to prove any harm to third parties as a result of the alleged misconduct. Assuming that defendant had proven some link between this type of solicitation and accountant misconduct, the defendant has not shown how the prohibited form of solicitation

is more likely to result in misconduct compared to other permissible forms of solicitations. Therefore, Florida Administrative Code, §§ 21A-24.002(2) and (3), fail to satisfy Central Hudson's requirement that the regulation directly advance a substantial government interest. Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566 (1980). Thus, the defendant cannot prove that there is a "reasonable fit" between the objective of preventing fraud and the harsh restriction on speech chosen to accomplish it. Board of Trustees of the State University of New York v. Fox, 109 S.Ct. 3028, 3035 (1989).

Further, even if this solicitation does directly result in the alleged misconduct, the present regulation does not reflect the only effective approach. Fox, 109 S.Ct. at 3034 (citations omitted). Under Florida Statutes, §§ 473.323(b) and (c), a CPA who engages in fraud is subject to fines, loss of license, and other penalties. As this statute directly addresses the alleged problem and provides adequate remedies, the blanket prohibition on in-person, direct, uninvited solicitation can be viewed only as an unnecessary restriction on speech. See Shapero v. Kentucky Bar Association, 486 U.S. 466, 476, 108 S.Ct. 1916, 1923 (1988); Fox, 109 S.Ct. at 3035 (regulations unconstitutional if "more extensive than their object requires").

IV. THE SECOND FACTOR

The defendant's argument that a blanket prohibition of in-person, direct, and uninvited solicitation by CPA's is necessary because of the difficulties in proving the occur-

rence of misconduct is also unpersuasive. In forwarding this argument, the defendant once again enlists the attorney solicitation cases for help. Once again, this reliance is misplaced. In the attorney context, the alleged misconduct in solicitation is "not visible or otherwise open to public scrutiny and for which it is 'difficult or impossible to obtain reliable proof of what actually took place.'" Shapero v. Kentucky Bar Association, 486 U.S. 466, 476 , 108 S.Ct. 1916, 1923 (1988) (quoting Ohralik v. Ohio State Bar Association, 436 U.S. 447, 466 (1978)).

In the CPA context, however, proof regarding alleged misconduct is readily available. The relevant financial data could be obtained via discovery from the client, and then used by an independent accountant to check the questioned financial statements. Irregularities could be uncovered through this relatively simply process, and the accountant who used improper methods and principles in violation of Florida Administrative Code, Rules 21A-22.001-008, could be appropriately disciplined. These facts are objectively verifiable. Cf. Zauderer, 471 U.S. 644 ("the indeterminacy of statements about law makes it improbable if not impossible to verify its accuracy or truthfulness").

V. CONCLUSION

Florida Administrative Code, §§ 21A-24.002(2) and (3), places an unconstitutional ban on protected commercial speech in violation of the first and fourteenth amendments. The Board of Accountancy and State are hereby enjoined from enforcing that regulation as it is applied to CPAs who seek clients through in-person, direct, uninvited solicitation in the business context.

DONE AND ORDERED this 13th day of September, 1990.

Maurice M. Paul
United States District Judge

FANE v. EDENFIELD

Scott FANE, Plaintiff-Appellee,

v.

Fred H. EDENFIELD, Jr., Richard J. Aboud, Whipple Van Ness Jones, Jr., Margaret F. Stroupe, Dean F. Denison, William R. Martin, Joseph R. Millsaps, Antonio L. Argis, Jerome A. Schine, in their official capacities as members, Board of Accountancy, Defendants-Appellants.

No. 90-3943.

United States Court of Appeals, Eleventh Circuit.

Oct. 30, 1991.

Appeal from the United States District Court for the Northern District of Florida.

Before EDMONDSON and DUBINA, Circuit Judges, and ESCHBACH,* Senior Circuit Judge.

DUBINA, Circuit Judge:

The appellants, all of whom are members of the Florida Board of Accountancy ("the Board"), appeal the district court's grant of summary judgment in favor of the appellee, Scott Fane ("Fane"). For the reasons which follow, we affirm the district court's grant of summary judgment.

I. FACTUAL BACKGROUND

Fane is a certified public accountant ("CPA") who is certified in New Jersey and Florida. In the mid-1980's, he

*Honorable Jesse E. Eschbach. Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

moved to Florida to set up an accounting practice, and sought to solicit business via in-person contacts with businesses he felt would be interested in his services. Fane was not able to implement his planned solicitation, however, because in-person solicitation by CPAs is forbidden in Florida.[1] The ban only applies to CPAs. Other financial professionals, such as non-certified accountants, bookkeepers, and tax preparers, are not prohibited from utilizing personal contacts to solicit new clients.

Only three other states, i.e., Georgia,[2] Texas,[3] and Louisiana,[4] prohibit in-person solicitation by CPAs. In addition, the accounting boards of twelve other states prohibit in-person solicitation, although the validity of such a prohibition by competing accountants without legislative authorization has been questioned under the antitrust laws. R1-18-1, Exh. D (letter from Anthony Low Joseph, Bureau of Competition, Federal Trade Commission, to Eleanor

[1]Pursuant to Fla.Stat.Ann. § 473.323(1)(1) (West 1991). A CPA engaging in "direct, in person, uninvited solicitation of a specific potential client" constitutes grounds for disciplinary action. Fla.Admin.Code Ann. R. 21A-24.002(3) (1991) defines a prohibited solicitation as "any communication which directly or implicitly requests an immediate oral response from the recipient." The regulation specifically states that "[u]ninvited in-person visits or conversations or telephone calls to a specific potential client are prohibited."

[2]O.C.G.A. § 43-3-35(i) (1988).

[3]Tex.Rev.Civ.Stat.Ann. art. 41a-1. § 6(a)(2) (West 1991).

[4]See United States v. State Board of Certified Public Accountants of Louisiana, Civ. No. 83-1947, 1987 WL 7905 (E.D.La. Mar. 11, 1987) (complaint alleging that restraints on advertising and solicitation violated antitrust laws dismissed on ground that legislature had authorized restraints).

Weinstock, Florida State Senator (Apr. 28, 1987), comparing Florida's statutory regulation of CPAs' solicitation to its regulation of other professions and the regulation of accountants in other states). See also Rhode Island Board of Accountancy, 107 F.T.C. 293 (1986).

Fane instituted this lawsuit in an effort to have Florida's prohibition of in-person solicitation by CPAs declared unconstitutional. The Board disputed any constitutional violation created by the proscription. The district court granted Fane's motion for summary judgment and enjoined the Board from enforcing the ban on in-person solicitation by CPAs in Florida. The Board then perfected its appeal to this court.

II. DISCUSSION

The only issue raised by the Board that we need to address is whether the district court correctly determined that Florida's prohibition on in-person solicitation by CPAs is unconstitutional.[5] We review the district court's order granting summary judgment de novo. Akins v. Snow, 922 F.2d 1558, 1560 (11th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 2915, 115 L.Ed.2d 1079 (1991). Conclusions of law rendered upon summary judgment are subject to the same standard of appellate review as any question of law brought on appeal. Morrison v. Washington County, Alabama, 700 F.2d 678, 682 (11th Cir.), cert. denied, 464 U.S. 864, 104

[5]The Board also argues that the district court erred by granting summary judgment in this case. Since we do not find any material factual disputes which would require resolution at trial, we see no merit to that argument. We will, therefore, address only the question of law decided by the district court.

S.Ct. 195, 78 L.Ed.2d 171 (1983), holding mod. on other grounds, Helicopter Support Systems, Inc. v. Hughes Helicopter Inc., 818 F.2d 1530 (11th Cir.1987) (citations omitted).

Fane contends that Florida's prohibition against in-person solicitation by CPAs is an unconstitutional restriction of commercial speech because the restraint does not further the state's interest in regulating the accounting profession, nor is it narrowly tailored to that end. Fane also maintains that the imposition of the ban upon CPAs, but not on other accounting professionals who perform the same tasks, is a violation of equal protection. The Board argues that the ban is necessary to protect a CPA's integrity, independence, and objectivity while performing the attest function.[6] The Board also argues that the ban is a permissible time, place, and manner restriction that is content neutral.

Commercial speech, i.e., expression that is related exclusively to the economic interests of the speaker and audience, is undeniably entitled to substantial protection under the First and Fourteenth Amendments of the United States Constitution.[7] Peel v. Attorney Registration and Disciplinary Comm'n, ___ U.S. ___, 110 S.Ct. 2281, 110

[6]The attest function is the issuance of an independent opinion regarding a client's financial stability based on an audit or review of a clients financial statements. Only CPAs perform the attest function.

[7]The First Amendment, as applied to the states by the Fourteenth Amendment, protects commercial speech from unjustified governmental regulation. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561, 100 S.Ct. 2343, 2348, 65 L.Ed.2d 341 (1980).

L.Ed.2d 83 (1990); Board of Trustees of State University of New York v. Fox, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988); Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626,105 S.Ct. 2265, 85 L.Ed.2d 652 (1985); Central Hudson Gas & Elec. Corp. v. Public Serv. Commn, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341(1980); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). The informational function of advertising forms the basis for the First Amendment's concern for commercial speech. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783, 98 S.Ct. 1407, 1419, 55 L.Ed.2d 707 (1978). Commercial speech furthers the economic interests of the speaker while also assisting the consumer audience. Central Hudson, 447 U.S, at 561-62, 100 S.Ct. at 2348-49. The importance of the dissemination of commercial information is its benefit to consumers and society. Virginia State Board of Pharmacy, 425 U.S. at 764-65, 96 S.Ct. at 1827.

Blanket prohibitions on commercial speech are disfavored. Shapero, 486 U.S. at 476, 108 S.Ct. at 1923. The mere possibility that isolated abuses or mistakes may occur does not justify a total ban on a certain mode of protected commercial speech. Id. Any restriction of commercial speech requires "the government goal to be substantial, and the cost to be carefully calculated." Fox, 492 U.S. at 480, 109 S.Ct. at 3035. For example, the government may ban commercial speech that is more likely to deceive the public

than to inform it, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 464-65, 98 S.Ct. 1912, 1922-23, 56 L.Ed.2d 444 (1978), or commercial speech that is related to illegal activity, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388, 93 S.Ct. 2553, 2560, 37 L.Ed.2d 669 (1973). In most other contexts, the First Amendment prohibits regulation based on the content of the speech. Consolidated Edison Co. of New York, Inc. v. Public Service Comm'n, 447 U.S. 530, 537-38, 100 S.Ct. 2326, 2333-34, 65 L.Ed.2d 319 (1980).

In Central Hudson, the Supreme Court articulated the following four-part test for assessing the constitutionality of a restriction on commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566, 100 S.Ct. at 2351. In applying the Central Hudson analysis to Florida's restriction of Fane's commercial speech, the district court found that Florida's prohibition of in-person solicitation by CPAs failed to

advance the governmental interest asserted and was more extensive than was necessary to serve that interest.[8]

In reviewing the validity of Florida's restriction on in-person solicitation by CPAs, we must determine whether there exists a "'fit' between the legislature's ends and the means chosen to accomplish those ends...." Fox, 492 U.S. at 480, 109 S.Ct. at 3035 (quoting Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 341, 106 S.Ct. 2968, 2977, 92 L.Ed.2d 266 (1986)). The relationship between the legislature's means and ends must be reasonable, but does not require perfection; furthermore, its scope must be "in proportion to the interest served." Fox, 492 U.S. at 480, 109 S.Ct. at 3035 (quoting In re R.M.J., 455 U.S. 191, 203, 102 S.Ct. 929, 937, 71 L.Ed.2d 64 (1982)). Florida is not required to employ the least restrictive means to accomplish its ends, but it must utilize "a means narrowly tailored to achieve the desired objective." Fox, 492 U.S. at 480, 109 S.Ct. at 3035. Florida bears the burden of justifying its restrictions. Zauderer, 471 U.S. at 647, 105 S.Ct. at 2279.

The Board attempts to justify Florida's proscription of in-person solicitation by CPAs on the basis of the need to preserve and protect the public's ability to rely on the independence and objectivity of CPAs who are performing the attest function. The Board also contends that because there is no acceptable method of regulating in-person

[8]The first two prongs of the Central Hudson test are met. The speech in which Fane wishes to engage concerns a lawful activity and is not misleading; Florida's interest in regulating the accountancy profession is substantial.

solicitation, a prophylactic rule against its utilization by CPAs is necessary to protect the public. Nowhere in the record, however, do we find that the Board has produced any evidence of any link between in-person solicitation and the likelihood that a CPA will be more likely, or even willing, to engage in dishonest or oppressive conduct during such solicitation. Prophylactic restraints on commercial speech based on unsupported assertions or unsubstantiated fears are not acceptable. Zauderer, 471 U.S. at 647-18, 105 S.Ct. at 2279-80. "[T]he States may not place an absolute prohibition on certain types of potentially misleading information ... if the information also may be presented in a way that is not deceptive." In re R.M.J., 455 U.S. at 203, 102 S.Ct. at 937. The availability to the general public of commercial information such as that Fane seeks to communicate is valuable enough to justify imposing the burden upon Florida of distinguishing "the truthful from the false, the helpful from the misleading, and the harmless from the harmful." Zauderer, 471 U.S. at 646, 105 S.Ct. at 2279. Broad prophylactic rules simply cannot be justified if the protections afforded commercial speech are to remain viable. Id. at 649, 105 S.Ct. at 2280-81.

Even if there were evidence before us to indicate that allowing CPAs who perform audit and review engagements to solicit in-person would undermine the integrity of financial statements, that still would not justify the total prohibition of in-person solicitation by all CPAs. CPAs who specialize in many aspects of the accounting profession have no occasion to attest to the accuracy of audits or financial

statements. If allowed at all, Florida's statute must be narrowly tailored to achieve its anticipated objective.

> A statute is narrowly tailored if it targets and eliminates no more than the exact source of the "evil" it seeks to remedy. A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil.

Frisby v. Schultz, 487 U.S. 474, 485, 108 S.Ct. 2495, 2502-03, 101 L.Ed.2d 420 (1988) (citation omitted). Florida's restriction bans far more speech than is necessary in light of the justification offered for its restraint.

If a state can combat wrongdoing by direct means, it cannot use its interest in foreclosing harm to justify broad-scale restraints on speech. Shapero, 486 U.S. at 476, 108 S.Ct. at 1923. Regulatory requirements exist in Florida that can be utilized to preserve the independence of CPAs who perform the attest function. The Board does not offer any explanation as to why those requirements do not adequately afford the protection which it seeks. First and foremost, Fla. Stat. Ann. § 473.315(1) (West 1991) prohibits a CPA from expressing "an Opinion on the financial statements of an enterprise unless he and his firm are independent with respect to such enterprise." Second, CPAs are forbidden from engaging in any kind of fraudulent or deceptive conduct. See Fla. Stat. Ann. § 473.323(1)(f), (k) (West 1991).[9] Third, negligent certification of financial state-

[9]CPAs who violate Florida statutes regulating the practice of public accounting can be punished by penalties ranging from fines to license revocation. See Fla.Stat.Ann. § 473.323(3)(b), (c) (West 1991).

ments could give rise to tort liability. The Florida Supreme Court recently held that in certain circumstances, a CPA can be held liable to those persons whom he "knows" will rely on his opinion, regardless of whether the CPA is in privity with them. First Florida Bank v. Max Mitchell & Co., 558 So.2d 9, 15 (Fla.1990). The Board has the duty to at least explore less intrusive alternatives than a blanket ban on in-person solicitation imposed on all CPAs. Shapero, 486 U.S. at 477-78, 108 S.Ct. at 1923-24. Furthermore, the utilization of an advertising ban to protect the ethical or performance standards of a profession is impermissible. Central Hudson, 447 U.S. at 564 ,100 S.Ct. at 2350. See also Virginia State Board of Pharmacy, 425 U.S. at 769, 96 S.Ct. at 1829.[10]

The Board asserts that speech protected by the First Amendment, whether commercial or ideological, may still be subjected to legitimate time, place, and manner restrictions, so long as those regulations are based on criteria that is content neutral. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 103 S.Ct. 948, 954-55, 74 L.Ed.2d 794 (1983). A time, place, and manner restriction seeks merely to regulate when, where, and how the protected activity may take place. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46, 106 S.Ct. 925, 928, 89 L.Ed.2d 29 (1986). The regulation challenged by Fane does more, however, for it acts as an unqualified ban on in-person

[10]Because we find that Florida's ban is an impermissible restriction of commercial speech in violation of the First Amendment, we need not address Fane's equal protection argument.

solicitation rather than regulating the details of when, where, and how a CPA may engage in such solicitation. Furthermore, a constitutionally permissible time, place, and manner restriction must not be based upon the content of the speech. Consolidated Edison, 447 U.S. at 536, 100 S.Ct. at 2332-33. Florida's regulation of in-person solicitation by CPAs is not content neutral. It is a speaker-specific, unqualified ban on a category of expressive activity. Only CPAs who wish to speak directly to potential clients are restrained. The appropriate bounds of time, place, and manner restrictions on commercial speech are clearly exceeded by Florida's statute.[11]

The Board also argues that its position is supported by Ohralik, 436 U.S. at 447, 98 S.Ct. at 1913 (upholding a ban on in-person solicitation by attorneys) and National Funeral Servs., Inc. v. Rockefeller, 870 F.2d 136 (4th Cir.), cert. denied, ___ U.S. ___, 110 S.Ct. 409, 107 L.Ed.2d 374 (1989) (upholding a ban on in-person solicitation by funeral directors selling pre-need burial services). The district court

[11]Fane objects to our consideration of the Board's time, place, and manner argument because the Board did not present it to the district court. Although we generally decline to consider a legal theory that was not raised at the district court level, we have the discretion to consider an argument first made on appeal. Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc., 689 F.2d 982, 989 (11th Cir. 1982). We may exercise that discretion if the omitted issue involves a pure question of law and if refusal to consider it would result in a miscarriage of justice. Id. at 989-90. Consideration of legal arguments not presented to the district court is especially appropriate on appeal from summary judgment. Id. at 990. Consequently, we have considered the Board's argument, but find that it has no merit.

concluded that Ohralik and National Funeral Services do not apply to this case because the nature of the accounting profession and its soliciting targets differs in material respects from the legal and funeral services professions and their soliciting targets, making the imposition of such a ban on CPAs unnecessary.

As the majority opinion in Ohralik indicates, and as Justice Marshall's concurrence makes clear, the holding of Ohralik is limited. "[T]he solicitation of business, under circumstances--such as those found in this record--presenting substantial dangers of harm to society or the client independent of the solicitation itself, may constitutionally be prohibited by the State." 436 U.S. at 470, 98 S.Ct. at 1926 (Marshall, J., concurring in part and concurring in the judgment). The majority opinion rests on whether an Ohio attorney disciplinary rule had been constitutionally applied to Ohralik. Id. at 467-68, 98 S.Ct. at 1924-25. Indeed, Ohralik did not challenge the rule on its face, and conceded its constitutionality in some contexts. Id. at 461-62, 466 n.27, 98 S.Ct. at 1921-22, 1924 n.27. Ohralik deals with an outrageous situation in the area of attorney solicitation.[12] Many cases will fall between the extremes of Ohralik and

[12]Ohralik solicited business from two young accident victims, approaching one while she lay in traction in a hospital bed. He employed a concealed tape recorder to assist him in his solicitation efforts and emphasized the contingent nature of his fee to make his offer appear cost-free and irresistible. In addition, he refused to withdraw even when requested to do so by his client and misrepresented himself to her insurance company. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 450-52, 98 S.Ct. 1912, 1915-17, 56 L.Ed.2d 444 (1978).

cases such as NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) and In re Primus, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978), where solicitation by attorneys is clearly permitted because of its political expression and association value. Ohralik, 436 U.S. at 471-72, 98 S.Ct. at 1926-27 (Marshall, J.).

We are presented here with such an intermediate case in the context of another class of professionals--CPAs.[13] The possibilities for overreaching, invasion of privacy, exercising undue influence, and outright fraud that the Supreme Court found were cause for concern if lawyers were allowed to solicit in-person are remote in the accounting profession. See Ohralik, 436 U.S. at 464-66, 98 S.Ct. at 1922-24. Solicitation by a CPA does not entail the "coercive force of the personal presence of a trained advocate." Zauderer, 471 U.S. at 642, 105 S.Ct. at 2277. Likewise, the solicitation of a business person by an accountant is in no way comparable to the intrusive solicitation of a family member by a salesperson of funeral services at a time of emotional vulnerability. See National Funeral Services, 870 F.2d at 142-45. We agree with the district court that the ban on in-person solicitation endorsed in Ohralik and National Funeral Services is not necessary to protect the general public from solicitation by a CPA.

---

[13]The state interests in Ohralik were found by the Court to be particularly strong because "lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" 436 U.S. at 460, 98 S.Ct. at 1920. Patently, this added concern is not present in this case.

III. CONCLUSION

We do not lightly interfere with a state's power to regulate the professions which practice within it. Nevertheless, the state's regulatory power cannot be used to insulate restrictions of constitutionally protected speech from our review for constitutional infirmity. See Peel, __ U.S. at ___, 110 S.Ct. at 2291-92. In this case, Florida's restriction of in-person solicitation by CPAs does not directly advance the state's asserted interest. The justification offered for the ban could be served equally well by existing regulations imposed on the accounting profession or by a more limited restriction of the protected speech. We therefore affirm the district court's order granting summary judgment in favor of Fane and enjoining the State of Florida from enforcing its ban on in-person solicitation by CPAs.

AFFIRMED.

EDMONDSON, Circuit Judge, dissenting:

States have a strong interest in regulating the practice of professions within their borders. Goldfarb v. Virginia State Bar, 421 U.S. 773, 792, 95 S.Ct. 2004, 2016, 44 L.Ed.2d 572 (1975). Because I believe states are largely free to regulate the professionals which they license, I reach a different conclusion in this case. My view is that Florida's regulation, prohibiting face-to-face solicitation of clients by certified public accountants (CPAs), should stand.

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), is extremely persuasive and supports Florida's prohibition against in-person solicitation by CPAs. In Ohralik, the Supreme Court upheld a state regulation prohibiting in-person solicitation of clients by

lawyers. The Court's reasoning focused on the potential harms that face-to-face solicitation poses for prospective clients. Because in-person solicitation inherently opens the door to "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct.'" Id. at 462, 98 S.Ct. at 1921, the Court recognized the need for a state to enact a rule designed to protect lay people. With advertising generally the recipient may simply turn away, but in-person solicitation may exert pressure and often demand an immediate response from the prospective client, who then has less opportunity for reflection. Id. And because in-person solicitation is not visible or otherwise open to public scrutiny, such solicitation is hard to oversee effectively or to regulate. Id. at 466, 98 S.Ct. at 1924. The Court, consequently, recognized the need for a state to adopt a prophylactic measure, such as a ban on in-person solicitation, to prevent harm from occurring. Id. at 464, 98 S.Ct. at 1923.

In upholding the state's prohibition, the Court in Ohralik noted that people contacted in-person might be especially susceptible to a lawyer's pressure since lawyers are "advocate[s] trained in the art of persuasion." Id. at 465, 98 S.Ct. at 1923. But this quoted language was not at the heart of the Ohralik 's reasoning. I think Ohralik's reasoning reaches professionals other than lawyers. After all, not all lawyers are trained advocates; now relatively few lawyers are directly involved in litigation or advocacy roles. In-person solicitation is potentially harmful chiefly because lawyers, as professionals, have (and are perceived by lay people to have) specialized knowledge beyond that of their

solicited clients. The special leverage, or ability to pressure others, that lawyers have is not so much a function of their oratory skill; instead, it stems from the gap in knowledge between the professional and the lay person. The client, when compared to the professional, is almost always unsophisticated when it comes to the subject of the professional's work. The danger lies with the lawyer who intimidates or baits the potential client with the lawyer's specialized knowledge while simultaneously preying on the client's relative ignorance. The result is that the client may be pressed to agree to hire the lawyer for fear of losing out on legal rights and remedies that the client does not fully understand or, because the directly solicited client has little time to compare the fees and qualities of competing lawyers, the client may employ the wrong lawyer or agree to pay too much.

CPAs also have (and are perceived to have) knowledge beyond that of their potential clients which CPAs could well use to entice or to intimidate clients. For example, CPAs provide tax advisory services and financial management services to clients, when many of these prospective clients may be ignorant of their potential rights and of their potential liabilities. To think that clients may be as vulnerable to a seemingly knowledgeable CPA as accident victims are to an ambulance chasing attorney is not unreasonable. In addition, by virtue of having the title "certified public accountant" bestowed upon him by a state, a CPA is cloaked with an aura of competence that can overawe prospective clients (just as easily as a persuasive lawyer could) due to the appearance of special knowledge that is

associated with his state licensure.* In the light of their specialized, professional knowledge, CPAs can be forceful and persuasive. Anyone who has ever signed, without fully understanding, a tax return or other financial statement prepared by a CPA simply because the CPA says "You sign here," knows just how persuasive a CPA can be.

Some differences in the circumstances surrounding solicitation of clients by lawyers and solicitation by CPAs undeniably exist; and, in general, the state's interest in regulating the legal profession (to the extent that lawyers as a group may still be seen as officers of the state's courts) may possibly be a bit greater. But I think for the purpose of constitutional analysis, the two professions are more alike than they are different. For instance, it may well be true that in most audit engagements potential clients of CPAs will not be under the kind of emotional distress that a potential personal injury client would be under when solicited by a lawyer. But nothing said in Ohralik seems to limit rules against in-person solicitation of clients by lawyers to rules barring soliciting personal injury clients in distress. In addition, as the Supreme Court noted in United States v. Arthur Young and Co., 465 U.S. 805, 104 S.Ct. 1495, 79

*In Florida, non-licensed tax preparers, bookkeepers, management advisory consultants and the like are permitted to engage in direct, in-person, uninvited solicitation. These people, however, are neither permitted to perform the "attest function," which is specifically reserved for CPAs, nor to hold themselves out as having that assured special competence and reliability that the title "CPA" gives. For the state to condition its grant of special privilege and standing upon the acceptance of additional restraints, including some prophylactic rules, is not unreasonable.

L.Ed.2d 826 (1984), a client has a great deal to lose, for example, if an auditor gives a qualified, adverse or disclaimed opinion as to the accuracy of a company's financial records. Id. at 818 n.13, 104 S.Ct. at 1503 n.13. As such, while a soliciting CPA may not be in the posture of addressing an injured person, he can easily be in the position of addressing a client who has everything to gain from a glowing, unquestioning opinion, and everything to lose from any less favorable opinion. So, in addition to the problems that lurk whenever professionals are allowed to engage in face-to-face solicitation, there is an incentive for fraudulent CPAs to solicit clients by promising to overlook financial misstatements or by promising to give a favorable review. See Id. at 461, 98 S.Ct. 1921.

We should also recall how hard it is for a state to monitor in-person solicitations. Because of the heavy reliance that the public places in the accuracy of financial statements reviewed by CPAs, Florida Bank v. Max Mitchell & Co., 558 So.2d 9 (1990), and for other reasons that seem to apply to professionals in general, there is a strong state interest that CPAs be prevented from compromising their integrity by soliciting clients underhandedly. And, a ban on in-person solicitation is directly related to that state interest.

In Ohralik, the Court specifically noted that a "state does not lose its power to regulate commercial activity deemed harmful to the public wherever speech is a component of the activity." Ohralik, 436 U.S. at 456, 98 S.Ct. at 1919. Therefore, simply because Florida's regulation involves speech does not mean that the regulation must be struck down on constitutional grounds. The Ohralik Court said that

"procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation." Id. at 459, 98 S.Ct. at 1920 (citations omitted). This point is to me the important one.

The First Amendment provides greater or lesser protection to speech depending on its context, that is, whether the speech is political, commercial or something else. The degree of protection afforded commercial speech is toward the low end of the scale. See Ohralik, 436 U.S. at 456, 98 S.Ct. at 1918 ("[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values. . . ."). And, I believe the degree of protection from state interference is still lower when the states are carrying out their traditional and important job of policing the professions. The Ohralik Court specifically recognized that "[w]hile entitled to some constitutional protection," a professional's conduct is "subject to regulation in furtherance of important state interests." Id. at 459, 98 S.Ct. at 1920.

Even if I personally questioned that the Florida rule is necessary for an ordered CPA profession, it would not be my place just to second guess state officials about the state rule's wisdom or effectiveness. What is important for me to see is that reasonable people, such as those that I expect comprise the Florida Board of Accountancy, could think that the rule against in-person solicitation of clients functions to assure greater competence of CPAs, more reasoned selection of CPAs by lay people, and the accuracy of audit statements upon which the public relies. And, even if a less

sweeping rule might do, that circumstance would be of no great significance. I cannot say that the rule Florida has chosen is an unreasonable solution to the problems inherent in uninvited, in-person solicitations of clients for profit. See Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 480, 109 S.Ct. 3028, 3035, 106 L.Ed.2d 388 (1989) (manner of regulating speech need not be "absolutely the least severe that will achieve the desired end"; fit between ends and means need only be "reasonable").

I would uphold the Florida rule as a legitimate use of the state's authority to regulate a profession within its borders and, therefore, would vacate the judgment of the district court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-3943

SCOTT FANE,

Plaintiff-Appellees,

vs.

FRED H. EDENFIELD, JR., RICHARD J. ABOUD, WHIPPLE VAN NESS JONES, JR., MARGARET F. STROUPE, DEAN F. DENISON, WILLIAM R. MARTIN, JOSEPH R. MILLSAPS, ANTONIO L. ARGIZ, JEROME A. SCHINE, in their official capacities as members, Board of Accountancy,

Defendant-Appellants.

On Appeal from the United States District Court for the Northern District of Florida

---

ON PETITION(S) FOR REHEARING
AND SUGGESTION(S) OF REHEARING EN BANC

Before: EDMONDSON and DUBINA, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Bank are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

JOEL F. DUBINA
UNITED STATES CIRCUIT JUDGE

*Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

sps\pld\fane-den.reh